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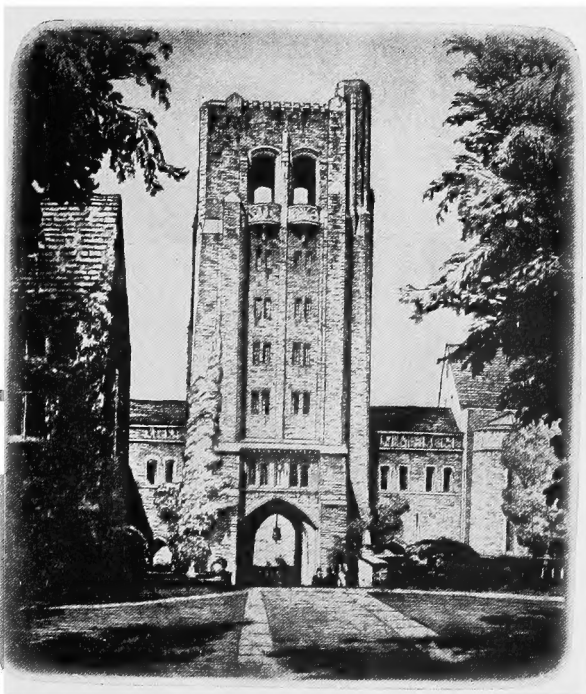
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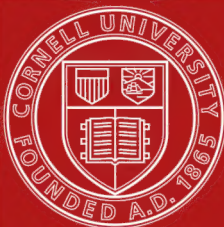
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# THE LAWS OF NEUTRALITY AS EXISTING ON AUGUST 1, 1914

MAY, 1918



WASHINGTON  
GOVERNMENT PRINTING OFFICE  
1918



U.S. Laws, statutes, etc.  
**THE LAWS OF NEUTRALITY AS  
EXISTING ON AUGUST 1, 1914**

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## ABBREVIATIONS.

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Austro-Hungarian Manual	Anhang zum Dienstreglement für die k. u. k. Kriegsmarine (Internationales See- und Landkriegsrecht) Vienna, 1913.
C. Rob.	Reports in the High Court of Admiralty [England 1798-1809]. 6 vols. [English Admiralty Reports, vols. 1-3.]
Cranch	U. S. Supreme Court Reports 5-13. U. S. 1801-1815.
Ct. Cl.	Cases decided in the Court of Claims of the United States.
Dall	Reports of Cases in the Courts of the United States [1790-1800] and Pennsylvania [1754-1806].
Fed. Cases	Federal Cases. Comprising cases argued and determined in the Circuit and District Courts of the United States. 1894-.
For. Rel.	Foreign Relations of the United States.
French Naval Instructions	Instructions sur l'application du droit international en cas de guerre. Dec. 19, 1913. In U. S. Naval War College—International law topics, 1913.
Gallison	Reports, Circuit Court United States, First Circuit, 1812-1815, Boston 1845. 2 vols.
German Prize Rules	Prisenordnung Sep. 30, 1909. (Reichsgesetzblatt Aug. 3, 1914.)
German War Book	The War Book of the German General Staff. Being "The Usages of War on Land" issued by the Great General Staff of the German Army. Translated by J. H. Morgan. New York. 1915.
Hall	W. E. Hall: A treatise on international law. Fourth edition. Oxford, 1895.
Halleck	H. W. Halleck: International law. San Francisco, 1861.
Holland	Manual of Naval Prize Law.
Institute	Resolutions of the Institute of International Law. Collected and translated by the Carnegie Endowment for International Peace (Oxford University Press, 1916).
Japanese Regulations	Japanese Prize Court Regulations, 1904 (Russian and Japanese Prize Cases, Vol. 2, p. 416.)
Kent	James Kent: Commentaries on American law. Twelfth edition, edited by O. W. Holmes, jr. Boston, 1873.
K. B. D.	Law Reports King's Bench Division—England—London.
Lawrence	T. J. Lawrence: The principles of international law. Fifth edition. Boston, 1913.
L. R.	Law Reports — Privy Council Cases. 1837-1872.



Lieber-----	Instructions for the Government of the Armies of the United States in the Field, 1863.
Moore's Digest-----	A Digest of International Law. By J. B. Moore, Washington, 1906.
Moore's International Arbitrations-----	History and Digest of the International Arbitrations to which the United States has been a party. Washington, 1898. 6 vols.
Op. Atty. Gen-----	Official Opinions of the Attorney General of the United States, 1789. 1852.
Oppenheim-----	L. Oppenheim: International Law. Vol. II. War and neutrality. Second edition. London, 1912.
Peters-----	Cases in the Supreme Court of the United States, 1828-1842. 16 vols.
Russian and Japanese prize cases-----	Russian and Japanese Prize Cases. Edited by C. J. B. Hurst. 2 vols. London, 1912.
Russian Instructions-----	Procedure in Stopping, Examining, etc., Sept. 20, 1900 (Br. & For. State Papers, vol. 24, pp. 882-893).
Russian Regulations-----	Regulations as to Naval Prizes, 1895 (Russian and Japanese Prize Cases, vol. 1, p. 311).
Russian Rules-----	Rules concerning contraband (Great Brit. Correspondence respecting Contraband in War. Cd. 2348).
Spinks-----	Ecclesiastical and Admiralty Reports. London. 1855. 2 vols.
Spinks Prize Cases-----	Prize Cases, Reports of cases in the Admiralty Prize Court and the Court of Appeal. London. 1856.
Turkish Regulations-----	Provisional Law on prizes, Feb. 3, 1912.
U. S.-----	U. S. Supreme Court Reports.
U. S. Naval War Code-----	Law and usages of war at sea, a Naval War Code prepared by Capt. Charles H. Stockton, Washington, Naval War College, 1904.
Westlake-----	John Westlake: International Law, part II, War. Second edition. Cambridge, 1913.
Dana's Wheaton-----	Henry Wheaton: Elements of international law. Eighth edition, edited with notes by Richard Henry Dana. Boston, 1866.
Woolsey-----	Theodore Dwight Woolsey; Introduction to the Study of International Law. Sixth edition, revised by Theodore Salisbury Woolsey, New York. 1908.



## THE LAWS OF NEUTRALITY AS EXISTING ON AUGUST 1, 1914.

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### ENEMY'S GOODS ON NEUTRAL VESSEL.

The neutral flag covers enemy's goods, with the exception of contraband of war.—*Declaration of Paris, Article 2.*

All and every the subjects and inhabitants of the Kingdom of Sweden, as well as those of the United States, shall be permitted to navigate with their vessels, in all safety and freedom, and without any regard to those to whom the merchandizes and cargoes may belong, from any port whatever; and the subjects and inhabitants of the two States shall likewise be permitted to sail and trade with their vessels, and, with the same liberty and safety, to frequent the places, ports, and havens of Powers enemies to both or either of the contracting parties, without being in any wise molested or troubled, and to carry on a commerce not only directly from the ports of an enemy to a neutral port, but even from one port of an enemy to another port of an enemy, whether it be under the jurisdiction of the same or of different Princes. And as it is acknowledged by this treaty, with respect to ships and merchandizes, that free ships shall make the merchandizes free, and that everything which shall be on board of ships belonging to subjects of the one or the other of the contracting parties shall be considered as free, even though the cargo, or a part of it, should belong to the enemies of one or both, it is nevertheless provided that contraband goods shall always be excepted; which being intercepted, shall be proceeded against according to the spirit of the following articles.

Treaty of Amity and Commerce, concluded between the United States and Sweden, April 3, 1783. Article VII.

If one of the contracting parties should be engaged in war with any other Power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent Powers shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other.

Treaty of Amity and Commerce concluded September 10, 1785, between the United States and Prussia, Article XII.

If any goods belonging to any nation with which either of the parties are at war should be loaded on board vessels belonging to the

other party, they shall pass free and unmolested, and no attempts shall be made to take or detain them.

Treaty of Peace and Amity concluded between the United States and Tripoli, June 4, 1805, Article IV.

And if any goods belonging to any nation, with whom either of the parties shall be at war, shall be loaded on vessels belonging to the other party, they shall pass free and unmolested, without any attempt being made to take or detain them.

Treaty of Peace and Friendship, concluded between the United States and Morocco, September 16, 1836, Article III.

It shall be lawful for the citizens of the United States of America and of the Republic of New Granada to sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandise laden thereon, from any port to the places of those who now are or hereafter shall be at enmity with either of the contracting parties. It shall likewise be lawful for the citizens aforesaid to sail with the ships and merchandise before mentioned, and to trade with the same liberty and security from the places, ports and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy before mentioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of one power or under several. And it is hereby stipulated, that free ships shall also give freedom to goods, and that everything which shall be found on board the ships belonging to the citizens of either of the contracting parties shall be deemed to be free and exempt, although the whole lading or any part thereof should appertain to the enemies of either, (contraband goods being always excepted).

Treaty of Peace, Amity, Navigation, and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XV.

The two High Contracting Parties recognize as permanent and immutable the following principles, to wit:

1st. That free ships make free goods that is to say, that the effects or goods belonging to subjects or citizens of a Power or State at war are free from capture and confiscation when found on board of neutral vessels, with the exception of articles contraband of war.

2d. \* \* \* They engage to apply these principles to the commerce and navigation of all such Powers and States as shall consent to adopt them on their part as permanent and immutable.

Convention as to Rights of Neutrals at Sea, concluded between the United States and Russia, July 22, 1854, Article I.

The two high contracting parties recognize as permanent and immutable the following principles:

1st. That free ships make free goods; that is to say, that the effects or merchandise belonging to a Power or nation at war, or to its citizens or subjects, are free from capture and confiscation when found on board of neutral vessels, with the exception of articles contraband of war.

\* \* \* \* \*



The two high contracting parties engage to apply these principles to the commerce and navigation of all Powers and States as shall consent to adopt them as permanent and immutable.

Convention Declaring the Principles of the Rights of Neutrals at Sea, concluded between the United States and Peru, July 22, 1856, Article 1.

The two high contracting parties recognize as permanent and immutable the following principles, to wit:

1st. That free ships make free goods; that is to say, that the effects or goods belonging to subjects or citizens of a power or State at war are free from capture or confiscation when found on board of neutral vessels, with the exception of articles contraband of war.

\* \* \* \* \*

The contracting parties engage to apply these principles to the commerce and navigation of all such powers and States as shall consent to adopt them as permanent and immutable.

Treaty of Peace, Friendship, Commerce, and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XVI.

It shall be lawful for the citizens of the United States, and for the subjects of the Kingdom of Italy, to sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandise laden thereon, from any port to the places of those who now are, or hereafter shall be, at enmity with either of the contracting parties. It shall likewise be lawful for the citizens aforesaid to sail with the ships and merchandise before mentioned, and to trade with the same liberty and security from the places, ports, and havens of those who are enemies of both or either party without any opposition or disturbance whatever, not only directly from the places of the enemy before mentioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of one power or under several; and it is hereby stipulated that free ships shall also give freedom to goods, and that everything shall be deemed to be free and exempt from capture which shall be found on board the ships belonging to the citizens of either of the contracting parties, although the whole lading or any part thereof should appertain to the enemies of the other, contraband goods being always excepted. \* \* \* Provided, however, and it is hereby agreed, that the stipulations in this article contained, declaring that the flag shall cover the property, shall be understood as applying to those powers only who recognize this principle, but if either of the two contracting parties shall be at war with a third, and the other neutral, the flag of the neutral shall cover the property of enemies whose governments acknowledge this principle, and not of others.

Treaty of Commerce and Navigation concluded between the United States and Italy, February 26, 1871, Article XVI.

The principle of the inviolability of enemy private property sailing under a neutral flag should be considered henceforth as fixed in the domain of the positive law of nations.

Institute, 1875, p. 14.

They [neutrals] are free to carry into belligerent ports all goods not comprised in the list of articles considered contraband of war.

Institute, 1898, p. 156.

**Contra.**

But neutral ships do not afford protection to enemy's property, and it may be seized if found on board of a neutral vessel, beyond the limits of the neutral jurisdiction. This is a clear and well-settled principle of the law of nations. \* \* \*

The right to take enemy's property on board a neutral ship has been much contested by particular nations, whose interests it strongly opposed. This was the case with Prussia in the case of the Silesia loan, and with the Dutch in the war of 1756; and Mr. Jenkinson (afterwards Earl of Liverpool) published, in 1757, a discourse, very full and satisfactory, on the ground of authority and usage, in favor of the legality of the right, when no treaty intervened to control it. The rule has been steadily maintained by Great Britain. In France it has been fluctuating. The ordinance of the marine of 1681 asserted the ancient and severe rule, that the neutral ship, having on board enemy's property, was subject to confiscation. The same rule was enforced by the arrets of 1692 and 1704, and relaxed by those of 1744 and 1778. In 1780 the Empress of Russia proclaimed the principles of the Baltic code of neutrality, and declared she would maintain them by force of arms. One of the articles of that code was, that "all effects belonging to the subjects of belligerent powers should be looked upon as free on board of neutral ships, except only such goods as were contraband." The principal powers of Europe, as Sweden, Denmark, Prussia, Germany, Holland, France, Spain, Portugal, and Naples, and also these United States, acceded to the Russian principles of neutrality. But the want of the consent of a power of such decided maritime superiority as that of Great Britain was an insuperable obstacle to the success of the Baltic conventional law of neutrality; and it was abandoned in 1793 by the naval powers of Europe, as not sanctioned by the existing law of nations, in every case in which the doctrines of that code did not rest upon positive compact. During the whole course of the wars growing out of the French Revolution, the Government of the United States admitted the English rule to be valid, as the true and settled doctrine of international law; and that enemy's property was liable to seizure on board of neutral ships, and to be confiscated as prize of war. It has, however, been very usual, in commercial treaties, to stipulate that free ships should make free goods, contraband of war always excepted; but such stipulations are to be considered as resting on conventional law merely, and as exceptions to the operation of the general rule, which every nation not a party to the stipulation is at perfect liberty to exact or surrender. The Ottoman Porte was the first power to abandon the ancient rule, and she stipulated, in her treaty with France, in 1604, that free ships should make free goods, and she afterwards consented to the same provision in her treaty with Holland, in 1612; and according to Azuni, Turkey has, at all times, on international questions, given an example of moderation to the more civilized powers of Europe.

Kent, vol. 1, pp. 133, 134; Valin, Comm. 1, 3, title 9, Des Prises, art. 7; New Ann., Reg. 1780, title Public Papers, 113-120; Martens, Summary, 327, ed. Phil.; Journals of Congress, vii, 68, 185; Mr. Pickering's Letter to Mr. Pinckney, Jan. 16, 1797; Letter of Messrs. Pinckney, Marshall, and Gerry to the French Government, Jan. 27, 1798; Maritime Law of Europe, ii, 163.

**Contra.**

The government of the United States, in their negotiations with the republics in South America, have pressed very earnestly for the introduction and establishment of the principle of the Baltic code of 1780, that the friendly flag should cover the cargo; and this principle was incorporated into the treaty between the United States and Colombia, in 1825, and into the treaty of navigation and commerce between the United States and the Republic of Chile, in 1832. The introduction of those new republics into the great community of civilized nations has justly been deemed a very favorable opportunity to inculcate and establish, under their sanction, more enlarged and liberal doctrines on the subject of national rights. It has been the desire of our government to obtain the recognition of the fundamental principles, consecrated by the treaty with Prussia, in 1785, relative to the perfect equality and reciprocity of commercial rights between nations; the abolition of private war upon the ocean; and the enlargement of the privileges of neutral commerce. The rule of public law, that the property of an enemy is liable to capture in the vessel of a friend, is now declared, on the part of our government, to have no foundation in natural right; and that the usage rests entirely on force. Though the high seas are a general jurisdiction, common to all, yet each nation has a special jurisdiction over its own vessels; and all the maritime nations of modern Europe have, at times, acceded to the principle, that the property of an enemy should be protected in the vessel of a friend. No neutral nation, it is said, is bound to submit to the usage; and the neutral may have yielded at one time to the usage, without sacrificing the right to vindicate, by force, the security of the neutral flag at another. The neutral right to cover enemy's property is conceded to be subject to this qualification: that a belligerent nation may justly refuse to neutrals the benefit of this principle, unless it be conceded also by the enemy of the belligerent to the same neutral flag.

But whatever may be the utility or reasonableness of the neutral claim, under such a qualification, I should apprehend the belligerent right to be no longer an open question; and that the authority and usage on which the right rests in Europe, and the long, explicit, and authoritative admission of it by this country, have concluded us from making it a subject of controversy; and that we are bound, in truth and justice, to submit to its regular exercise, in every case and with every belligerent power who does not freely renounce it.

Kent, Vol. 1, pp. 138-140; Letter of Mr. Adams, Secretary of State, to Mr. Anderson, May 27, 1823; President's Message to the Senate, December 26, 1825, and to the House of Representatives, March 15, 1826.

**Contra.**

Whatever may be the true original abstract principle of natural law on this subject, it is undeniable that the constant usage and practice of belligerent nations, from the earliest times, have subjected enemy's goods in neutral vessels to capture and condemnation, as prize of war. This constant and universal usage has only been interrupted by treaty stipulations, forming a temporary conventional law between the parties to such stipulations.

Dana's Wheaton, pp. 551-552.

The conventional law, in respect to the rule now in question, has fluctuated at different periods, according to the fluctuating policy and interests of the different maritime States of Europe. It has been much more flexible than the consuetudinary law; but there is a great preponderance of modern treaties in favor of the maxim, *free ships free goods*, sometimes, but not always, connected with the correlative maxim *enemy ships enemy goods*; so that it may be said that, for two centuries past, there has been a constant tendency to establish, by compact, the principle, that the neutrality of the ship should exempt the cargo, even if enemy's property, from capture and confiscation as prize of war.

Dana's Wheaton, pp. 581, 582.

#### Contra.

During the war which commenced between the United States and Great Britain in 1812, the prize courts of the former uniformly enforced the generally acknowledged rule of international law, that enemy's goods in neutral vessels are liable to capture and confiscation, except as to such powers with whom the American Government had stipulated by subsisting treaties the contrary rule, that free ships should make free goods.

Dana's Wheaton, p. 603.

In their earliest negotiations with the newly established Republics of South America, the United States proposed the establishment of the principle of *free ships free goods*, as between all the powers of the North and South American Continents. It was declared that the rule of public law—that the property of an enemy is liable to capture in the vessels of a friend, has no foundation in natural right, and, though it be the established usage of nations, rests entirely on the abuse of force. No neutral nation, it was said, was bound to submit to the usage; and though the neutral may have yielded at one time to the practice, it did not follow that the right to vindicate by force the security of the neutral flag at another, was thereby permanently sacrificed. But the neutral claim to cover enemy's property was conceded to be subject to this qualification: That a belligerent may justly refuse to neutrals the benefit of this principle, unless admitted also by their enemy for the protection of the same neutral flag.

Dana's Wheaton, p. 603.

#### Relations of the United States to the Declaration of Paris.

\* \* \* when asked to give in our adhesion to the four articles [of the Declaration of Paris], the reply was that we were not willing to debar ourselves from the right to use privateers in any possible exigency of war, as our policy was to have a small navy, and we always had a large and very much exposed commerce; but that we would agree to the articles, if all private property at sea should be held exempt from capture. This, known as the "American Amendment," or "Marcy Amendment," was well received by the other parties to the Articles of Paris, but was prevented from being adopted by the opposition of England. Subsequently, the United States withdrew its proposal; seemingly unwilling to renounce the right to use privateers, even on the terms of exemption of all private property. At the outset of our civil war, the United States proposed conventions adopting the Articles of Paris as they stood,



without waiting for the recognition of the exemption of all private property. This failed, because Great Britain and France insisted upon the addition of an explanatory clause, intended to meet their own possible relations with the vessels of war or privateers of the rebel Confederacy, to which the United States Government would not agree. \* \* \*

The circular of Mr. Cass, Secretary of State, of 29th June, 1859, on the Declaration of Paris, while admitting the right of nations to stipulate for the reciprocal protection of each other's goods found in neutral vessels when they shall be at war with each other, and so indirectly to relieve neutral vessels from annoyance and loss, adds, "Those neutral nations which are prevented from being parties to such an engagement, have a right to insist that it shall not necessarily work to their injury. This dictate of justice would be palpably violated in the case of the United States, should this protecting clause of the Paris conference not enable these vessels, when neutral, to shield from capture the property of belligerents carried as freight."

On the other hand, a writer in the *Edinburgh Review* (No. 233), says, as to the principle of the second Article of Paris, "The United States have acquired no right to invoke it against this country. It would rest in the option of England either to adhere to the old rules of maritime warfare, in a war with the United States, or to maintain the principles of the Declaration of Paris." The last clause of the Declaration is in these words: "The present Declaration is not and shall not be binding, except between those powers who have acceded or shall accede to it."

If a nation, party to the Declaration, is at war with one which is not, the former is not bound to abandon its right to take its enemy's goods from vessels of neutral nations which are parties to the Declaration; and as the stipulation is made, not from any doubt that, as between belligerents only, such captures are the natural and proper results of war, but for the benefit of neutrals vexed thereby, all parties to the Declaration, when they are neutrals, are in danger of losing the benefits of it. If a nation party to the Declaration, being at war with one which is not, is at liberty to disregard the article, neutrals who are parties can not enforce it by resisting search, or by reprisals, or otherwise. In case of a war between two nations, both being parties to the Declaration, if either disregards it, can the other retaliate? If so, does not he also violate the conventional right of the neutral, a party with him to the Declaration, from whose vessel he takes his enemy's property in the way of retaliation? Does that make a breach of treaty and *casus belli*? If either belligerent violates the rule, and the neutral power, being also party to the treaty, does not resist the act and vindicate its right under the Declaration, does it not give the other belligerent the right to complain, and to seek that summary and rapid redress which the exigencies of war often require or justify?

The assertion of these rights and obligations, and the real or pretended suspicion that the opposite belligerent or a neutral, parties to the convention, do not observe the convention, or insist on its observance, together with the pressure of national exigencies, have been found sufficient, whether as causes or pretexts, to render unavailing all former compacts for the freedom of enemy's goods in neutral vessels. As to the Declaration of Paris, however, it may be said that the

number and power of the nations parties to it, with the increase of the influence of commerce, and of capital interested in neutral trade, may be sufficient to sustain it, even if it does not, by the accession of the United States, grow into international law. See the debates on the Declaration of Paris and the agreement of 1854, in the House of Commons, July 4, 1854. (Hansard, cxxxiv 1098); and in the House of Lords, May 22, 1856 (*ibid.*, cxlii 482). \* \* \*

During the civil war in the United States, the French Government felt uneasy lest France should suffer by reason of the fact that, under her treaty of 1800, the United States might condemn French goods in rebel vessels, while it would not do so with the goods of other nations with whom the United States had no such treaty. This no doubt, added a motive for the French to unite with England to arrange the difficulties that lay in the way of the accession of the United States to the Declaration of Paris. Mr. Seward's letter to Mr. Adams of 7th September, 1861, in which he breaks off the negotiations for an accession to the Declaration of Paris, still declares that the United States, in this war, will adopt the policy, "according to our traditional principles, that Her Majesty's flag covers enemy's goods not contraband of war. Goods of Her Majesty's subjects not contraband of war are exempt from confiscation, though found under a disloyal flag." (Dipl. Corr. 1861, p. 143.) And, in his letter to Mr. Dayton of Sept. 10, 1861, on the same subject, Mr. Seward says, "We have always practiced on the principles of the Declaration. We did so, long before they were adopted by the Congress of Paris, so far as the rights of neutral or friendly States are concerned. While our relations with France remain as they now are, we shall continue the same practice none the less faithfully than if bound to do so by a solemn convention." (Dipl. Corr. 1861, p. 251.)

The British and French Governments, through their consuls at Charleston, made an arrangement with the Confederacy, by which the Confederates agreed to adopt the third, fourth, and fifth Articles of Paris, but not the first. (British Parl. Papers, North America, No. 3.) And, in his letter to Lord Lyons on the Trent affair, Mr. Seward refers to the fact that the United States had, in this war, made known its intention to act in accordance with the second and third articles of the Declaration of Paris.

Again, Mr. Seward, in a letter to Mr. Hülsemann of Aug. 22, 1861, requests him to answer to the questions of Count Rechberg, that the United States, in its relations with Austria, "does adopt and will apply the principles thus recited" [the second, third, and fourth Articles of Paris]. (Dipl. Corr. of 1861, p. 191.)

Again, in a letter to Baron Gerolt of July 16, 1861, Mr. Seward, referring to the second and third Articles of Paris, says, "The undersigned has the pleasure of informing Baron Gerolt, by authority of the President of the United States, that the government cheerfully declares its assent to these principles, in the present case; and they will be fully observed by this government in its relations with Prussia." (Dipl. Corr. 1861, p. 44.)

Indeed, the United States made it known to the commercial powers of Europe that they were ready and desirous to adopt the second, third, and fourth Articles of Paris; that, although they preferred them with the "Marcy Amendment," and without the first article, they were willing to adopt them as they stood. They were

repelled, as has been shown (note 173, *ante*) by Great Britain and France insisting on a special restriction clause to meet the case of possible complications with the Confederates. Still, when this negotiation broke off, the United States made known its intention to follow the second, third, and fourth rules of the Declaration, in the war. It has been suggested that the President could not, by following the second Article, vary the law of nations so as to control the decisions of our prize courts. That is true. Those courts could be directed only by a statute of Congress or a treaty, and, in the absence of either, must look solely to the law of nations for their rule in a pending war; but the executive can carry out its foreign policy by instructions to the navy not to capture in such cases, and, if captures should be made, by directing a restitution before adjudication. No case is reported of a condemnation, in opposition to the second or third Articles of Paris, during the civil war.

Dana's Wheaton, Note 223.

The second article of the Declaration of Paris of 1856 forms a new era in the history of this doctrine of "free ships, free goods." \* \* \*

While the government of the United States has endeavored to introduce the rule of "free ships, free goods," by conventions, her courts have always decided that it is not the rule of war; and her diplomatists and her text-writers—with singular concurrence, considering the opposite diplomatic policy of the country—have agreed to that position.

Dana's Wheaton, Note 223.

#### Contra.

Although the United States, by their judicial tribunals and executive department, have recognized the right of capturing enemy's goods in neutral vessels, as a subsisting right under the law of nations, independently of conventional arrangements, they have always endeavored to incorporate the privilege of *free ships, free goods*, in their treaties, and advocated its adoption as a rule of international jurisprudence. It was incorporated in *Wilizet* treaties with France in 1778 and 1800, with the United Provinces in 1782, with Sweden in 1783, 1816, and 1827, with Prussia in 1785 and 1828, and with Spain in 1795; this last was modified in 1819, to the effect that the flag of the neutral should cover the property of the enemy only when his own government recognized the principle. The rule, thus modified, was applied to their treaties with Colombia in 1824, with Brazil in 1828, with Chile in 1832, with Mexico in 1831, etc., etc. In no case have they concluded any treaty sustaining a different principle, except that of 1794, with England.

Halleck, pp. 635, 636.

More than a year prior to this declaration [of Paris], the President of the United States had submitted, not only to the powers represented in the congress of Paris, but to all other maritime nations, two propositions which were substantially the same as those adopted, viz: "1. That free ships make free goods, that is to say, that the effects or goods belonging to subjects or citizens of a power or state at war are free from capture and confiscation when found on board of neutral vessels, with the exception of articles contraband of war." "2. That the property of neutrals on board an enemy's vessel is not

subject to confiscation, unless the same be contraband of war." The second and third articles of the declaration of the congress of Paris have been formally approved by the President of the United States, and, it is believed, also by most of the other maritime nations of Europe. Nevertheless, as the principle must be regarded as established by a conventional agreement, rather than by the general law of nations, it is binding only upon those who have acceded or may accede to it. There is very little probability, however, that any nation will hereafter attempt to enforce rules of maritime capture in conflict with the principle thus established by the great powers of Europe and America.

Halleck, p. 638.

#### Presumption of enemy ownership.

It is an established rule of the law of prize, that all goods found in an enemy's ship is presumed to be enemy's property.—*res in hostium navibus, praesumuntur esse hostium donec probetur*. The evidence required to repel this presumption, depends upon the particular character of the case. If the character of the ship is certainly hostile, the neutral character of the goods must be shown by documents on board at the time of capture. If these are insufficient, further proof is never allowed, and the penalty of forfeiture attaches as a matter of course. "It has been truly observed," says Mr. Duer, "that any other course would subject the prize tribunals to endless impositions and frauds, and enable the enemy, thus obtaining the benefit of other proof, to evade, by supplying the documentary evidence, the just rights of the captor." Although it is the duty, in all cases, of a neutral claimant to establish his claim by positive evidence, it is only when the character of the ship is certainly hostile that the presumption of the hostility of the goods can not be refuted by evidence additional to the documents found on the ship. In other cases, a reasonable time is allowed for the production of further proof, and it is only upon the failure to produce such proof, or its unsatisfactory nature when produced, <sup>after</sup> that the court proceeds to a condemnation.

Halleck, p. 639; Duer <sup>act</sup> insurance, vol. 1, pp. 534, 535.

We may say, in general, that until very recent times two rules have contended with one another—the rule that *the nationality of property on the sea determines its liability to capture*, or neutral property is safe on the sea and enemy's property may be taken wherever found, and the rule that *the nationality of the vessel determines the liability to capture*, or that the flag covers the cargo. By the first rule the neutral might safely put his goods into any vessel which offered itself, but could not convey the goods of his friend, being one of the belligerents, without the risk of their being taken by the other. By the second, when once the nationality of the ship was ascertained to be neutral, it went on its way with its goods in safety, but if it belonged to the enemy it exposed neutral goods on board as well as other to be taken. This latter rule consists of two parts, that free ships make free goods, and that enemy's ships make goods hostile, but the two are not necessarily, although part of the same principle, connected in practice; the former may be received without the latter.

It was a thing of secondary importance both for the neutral and for a belligerent, being a naval power, how the rules should shape

themselves in regard to the neutral's goods in hostile bottoms. And his own goods on board his own vessel were freely admitted to be safe. Hence justice and a spirit of concession to the neutral united in favor of the rule that *his goods were safe by whatever vessel conveyed*; although not safe from sundry inconveniences growing out of search and the capture of the hostile conveyance.

On the other hand, it was of great importance to the belligerent that the flag should not cover his enemy's goods, or that free ships should not make goods free; for thus, much of his power at sea to plunder or annoy his enemy would be taken away. To the neutral, the opposite rule, that free ships should make goods free, was of great importance; for the carrying trade, a part of which war would in other ways throw into his hands, would thus be vastly augmented. But the belligerent's interest on the whole prevailed. The nations, especially Great Britain, which had the greatest amount of commerce, had also the greatest naval force, with which they could protect themselves and plunder their foes, and therefore felt small need in war of hiding their goods in the holds of neutral ships. Thus, for a long time the prevailing rule was that *neutral goods are safe under any flag, and enemy's goods unsafe under any flag*. But at length neutral interests and the interests of peace preponderated; and the parties to the treaty of Paris in 1856, Great Britain among the rest, adopted for themselves the rule which will be valid in all future wars and is likely to be universal, that free ships are to make goods free. Likely to be universal, we say, unless a broader rule shall exempt all private property on the sea engaged in lawful trade from capture.

Woolsey, pp. 301, 302.

#### Policy of United States as to Declaration of Paris.

The true policy of the United States is to come under the operation of the four articles as soon as possible. The refusal was based on the utility of privateers in saving the expense of maintaining a large navy. But if a war should break out between the United States and any of the nations which signed the four articles, that is with any, excepting one or two, of the important civilized nations of the world, we could have no benefit from the four articles, and privateers could swarm the sea in pursuit of our merchant vessels. Nor could we, if we were neutrals, carry the goods of either enemy upon our vessels, for the four articles do not apply except to the signers of them. In war, especially with a leading commercial power, that would happen again which happened in the late war of the secession, when 715 vessels measuring 480,882 tons were transferred to British capitalists. Such was the result of a paltry naval force upon our shipping interest. On the other hand, by acceding to the four articles, we should be in a better position to aid in carrying through the principle of the entire exemption of all private property from capture, which should be engaged in innocent commerce. And that point once reached, what should we want of privateers, or of a large regular navy? Our position in relation to the powers of Europe would generally be neutral, but now we cut ourselves off from the advantages of neutrality, which are constant, on account of a possible advantage of a very questionable character.

Woolsey, p. 314, note.

As will be seen by a survey of the above cases, the right to seize enemy's goods sailing under neutral flag has been sustained in The

Julia, 8 Cranch, 181; The Nereide, 9 Cranch, 388; The Ariadne, 2 Wheat., 143. See The Caledonian, 4 Wheat., 100; The Hart, 3 Wall., 559; S. C., Bl. Pr. Ca. 379. That shipping goods in an enemy's ship gives presumption that goods belong to enemy, see The London Packet, 1 Mason, 14; The Amy Warwick, 2 Blatch. 635. On the other hand, the executive department of the Government, to use Mr. Marcy's language (Mr. Marcy to Mr. Mason, Aug. 7, 1850), "has strenuously contended that free ships made free goods, articles contraband of war excepted," and that this was then regarded by the Executive as the generally accepted rule is evidenced by Mr. Marcy's statement in the next sentence, that "Great Britain is believed to be almost the only maritime power which has constantly refused to regard this as a rule of international law." Even in the strain of the late civil war, Mr. Seward, when proposing to accede to the declaration of Paris on this point, did so on the ground that the declaration did not make a new rule, but established an old one, which the United States has maintained as a part of international law. This difference of opinion between the judicial and executive departments of the Government may be attributed, in the main, to the distinct political training of the two departments. The executive, from the time of the administration of Mr. Jefferson, inclined to the liberal view of international law which became then prevalent among political economists; and though Mr. Jefferson, when Secretary of State, at first thought the weight of authority was the other way, he changed his mind as to this; and took the lead, as President, in recommending as the best rule, that free ships should make free goods. The same doctrine was vindicated with great elaboration by Mr. Madison, and has been accepted, more or less conspicuously, whenever occasion arose, by succeeding Presidents. While, however, the executive department continued to accept these distinctive views of international law, of which Mr. Jefferson and Mr. Madison were the exponents, it was otherwise with the judiciary. In part this may be attributed to the strong antagonism of Chief Justice Marshall to Mr. Jefferson, and to the scheme of public law of which Mr. Jefferson was the leading exponent. But aside from this, and aside from the strong bias toward English law and English precedent, which arose from the prior political bias of that great judge, and of his earlier associates, it is impossible not to forget the effect produced, even on professional minds entirely impartial, by the reverence and affection all American lawyers must feel for English judicial literature. If this be the case now—if such literature charm us now, often influencing our judgment, amid the great mass which we possess of legal literature of our own—how much greater must have been the influence when the sole text book at hand was Blackstone, and when Sir William Scott's attractive and lucid judgments were the only sources from which prize law could be studied in the English tongue.

Note of Dr. Wharton, Wharton's Int. Law Digest, 111, 309.

But in 1854 it was felt that it was difficult for allied states to apply different legal theories in a common war, and an agreement for identical action was come to by Great Britain and France, under which the principle of the immunity of enemy's goods in neutral ships was provisionally accepted by the former. On the conclusion of the Treaty of Paris the same principle was accepted by the parties



to it in a Declaration, which was intended to form the basis of a uniform doctrine on maritime law, and to which all states not represented at the Congress were afterwards invited to accede. The only countries possessing a sea coast which, up to the present time, have withheld their formal adherence to the Declaration are the United States, Spain, Mexico, and Venezuela. But the United States announced at the beginning of the Civil War that they would give effect to the principle during the continuance of hostilities.

Although, therefore, the freedom of enemy's goods in neutral vessels is not yet secured by a unanimous act, or by a usage which is in strictness binding on all nations, there is little probability of reversion to the custom which was at one time universal, and which till lately enjoyed a superior authority.

Hall, p. 717.

The Armed Neutralities in which the Baltic powers confederated themselves in 1780 and 1800 adopted the rule "free ships free goods," and the refusal of England to assent to it became one of the chief sources of the charge so widely made against her on the continent of exercising an unjust domination over the sea. At the outbreak of the Crimean war in 1854 the different principles of England and France as to maritime law made it necessary for them to enter into a compromise enabling them to act as allies on a common system, and the terms arranged were the assent of Great Britain to the rule "free ships free goods" without the corollary "enemy ships enemy goods." At the close of the war this compromise received the concurrence of the other great powers of Europe, since extended to almost all the world, in the Declaration of Paris, 16 April, 1856, which begins with a preamble amply justified by the history which we have passed in review.

"Considering," it says, "that maritime law in time of war has long been the subject of deplorable disputes;

"That the uncertainty of the law of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties and even conflicts;

"That it is consequently advantageous to establish a uniform doctrine on such a point;

"[The signatories] have adopted the following solemn declaration:

\* \* \* \* \*

Westlake, vol. 2, pp. 144, 145.

An agitation was long maintained in England with the view of inducing this country to withdraw from the Declaration of Paris, which it was not within her power to do, that document being really a convention. And had it been possible to do so, the signature of England to the statement in the preamble, that the law was previously uncertain, might have been quoted against any attempt on her part to fall back on the rules of the Consolat as being law in the absence of convention. The United States, which refused to become a party to the Declaration because it did not completely exempt enemy property as such from capture at sea, covered by that refusal the narrower ground of enemy property under a neutral flag; and neither they nor Spain in their war of 1898, nor Japan and Russia

in their war of 1904, acted contrary to the Declaration. We may therefore conclude that enemy ships and enemy goods on board them are now, by international law, the only enemy property which, as such, is capturable at sea. That result is the only one conformable to principle, for the assimilation of ships to territory is now sufficiently established to make it no longer possible to ignore the fact that the invasion of a neutral ship, which is not reasonably believed to be offending against any law, is the invasion of a field in which innocent neutral authority is exclusive.

Westlake, vol. 2, p. 145.

The pure law-making treaties constitute a statute book of the law of nations. The first of them is the Declaration of Paris of 1856. It laid down four rules for the guidance of states when engaged in warfare at sea; and was negotiated by the powers represented at the great Conference of Paris, which settled for a time the near-Eastern question, and concluded the Crimean War, by the Treaty of Paris of 1856. They were seven in number; but five out of the seven were Great Powers. Further, the declaration aimed at universality by making provision for the adhesion of states unrepresented at the conference. The great majority signed immediately. Others have done so since, till at the present time only four signatures are wanting. Moreover, the powers that have refrained from signing have acted, when belligerents, as if they had signed, and have received, when neutrals, the same treatment as signatory powers. Thus the declaration has behind it the express consent of almost all civilized states and the tacit consent of the remainder. Nothing more is wanted to make it authoritative. It is an international statute, and others have followed it.

Lawrence, p. 45.

The next class of treaties we have to consider consists of those which stipulate avowedly for a new rule or rules between the contracting parties. They are signed by two or three states only, and are meant to establish in their mutual intercourse some principle of action not in general use. Thus they are evidence of what International Law is not, rather than of what it is; for if the rules they lay down had been embodied in it there would have been no need of special stipulations in order to obtain the benefit of them. The Treaty of 1785 between the United States and Prussia contains an agreement of the kind under consideration. By the thirteenth article the contracting powers declared that in case one was at war while the other was at peace, the belligerent would not confiscate contraband goods carried by a vessel of the neutral, but would be content to detain them instead. The common law of nations gives the right of confiscation, as the negotiators on both sides well knew. And because they knew it, they entered into stipulations to override the ordinary rule and substitute for it one that they preferred. It is clear that treaties of this kind are not sources of International Law. Only in one case can they become so, and that is when the new rule first introduced by one of them works so well in practice that other states adopt it. If they take it up one by one till all observe it, the first treaty in which it appears is its source, though a long interval of time may separate its original appearance from its final triumph.

An instance of this is to be found in the history of the famous rule *free ships, free goods*. The first treaty between Christian powers which contains it was negotiated between Spain and the Netherlands in 1650; and is therefore its source, though the rule was obliged to wait two centuries before it received, in the Declaration of Paris of 1856, such general acceptance as to make it part and parcel of the public law of the civilized world.

Lawrence, pp. 106, 107; Dumont, *Corps Diplomatique*, vol. vi, part I, p. 571.

Enemy goods found on board neutral ships must now be regarded as free from capture. \* \* \* In all ordinary cases the rule is that the flag covers the cargo, or, in other words, that enemy merchandise is safe when laden on board a neutral vessel. The old rule of the *Consolato del Mare* gave the captors a right to seize it, though the ship which carried it was released and received payment for its services. But the movement which began in the seventeenth century in favor of the principle summed up in the maxim "free ships, free goods" gained a decisive victory in 1856, at the close of the Crimean War. Its object was practically attained when Great Britain, which had hitherto supported the older rule, agreed to substitute the new one for it, and signed the Declaration of Paris, the second article of which set forth that "the neutral flag covers enemy's goods with the exception of contraband of war." Since then the vast majority of civilized states have given their formal adhesion to the Declaration, and those who have not have nevertheless observed its rules as belligerents, and accepted the benefit of them from belligerents when neutral. The uninterrupted practice of more than fifty years, the express assent of nearly every civilized state, and the almost unanimous support of jurists make the articles, including the second, as binding as anything in International Law which does not rest on the plainest dictates of humanity. We come, therefore, to this, that in cases of ordinary trade a belligerent may seize the goods of enemies at sea only when they are navigating in enemy vessels.

Lawrence, pp. 460, 461.

The freedom of enemy property from molestation under the flag of a friend is a concession made to neutrals; and in respect of it two questions have been raised. The first asks whether belligerents who have signed the Declaration of Paris are bound to give the benefit of it to neutrals who have refused their signatures. We reply that such a privilege can hardly be refused, in spite of the statement in the last clause of the Declaration that "it is not and shall not be binding except between those powers who have acceded or shall accede to it." For in the period during which it has been in existence, it has been observed in all maritime conflicts. The unbroken usage of more than half a century can, therefore, be pleaded on behalf of the binding nature of its rules, and surely this is enough to establish them as International Law on the basis of general consent, quite apart from any question of formal accession to a law-making document. Nonsignatory neutrals, who have themselves when belligerents acted upon the principle that the flag covers the cargo, would have reason to feel aggrieved should a power at war make the fact that they have not acceded to the Declaration an excuse for depriv-

ing their commerce of the protection it affords. In the Franco-German war of 1870-1871 both sides applied its principles to the property of American and Spanish subjects, though neither the United States nor Spain had signed it; and when the latter powers were themselves belligerents in 1898, they gave the benefit of the Declaration to all neutrals. A similar answer must be made to the further inquiry whether, when one belligerent has signed the Declaration of Paris and the other has not, the former is bound to act upon it in dealing with neutrals whose governments have acceded to it. There is room for doubt if we confine ourselves to the mere words of the document; but when we come to examine practice we find a strong tendency in favor of the more liberal interpretation. When England and France were at war with China, a non-signatory power, in 1860, they applied the second and third articles of the Declaration to neutral trade; and Chili and Peru did the same when they were allied against Spain in 1885. Indeed, it is far more likely that the belligerent who has not acceded to the Declaration will be induced to observe its rules than that the belligerent who has acceded to them will feel free to ignore them. The war at the end of the nineteenth century between China and Japan affords an apt illustration. From its beginning in 1894 to its end, China, the nonsignatory power, made no attempt to capture Japanese goods under a neutral flag or neutral goods under a Japanese flag, while Japan, the signatory power, showed no sign of a wish to ignore its obligations toward neutrals on the plea that they were not shared by China. The notion of a return to the old order is an idle dream. Those who entertain it have failed to grasp either the power of modern commerce or the strength of the moral ideas that tend to restrict the destructiveness of warfare. What neutral interests were able to obtain in 1856 they will be able to retain in future emergencies. We may adopt with confidence the view of one of the greatest of modern authorities, and hold that "the principle that the flag covers the cargo is forever secured."

Lawrence, pp. 666, 667; Twist, *Belligerent Right on the High Seas*, p. 8. Report of Drafting Committee of the Naval Conference of 1908-1909, ch. vi.; Mahan, *Influence of Sea Power on History*, Cr. I, p. 84.

Since, with the exception of a few States such as the United States of America, Colombia, Venezuela, Bolivia, and Uruguay, all members of the Family of Nations are now parties to the Declaration of Paris, it may well be maintained that the rules quoted are general International Law, the more so as the non-signatory Powers have hitherto in practice always acted in accordance with those rules.

Oppenheim, Vol. 2, pp. 220-221.

A consequence of the now recognized freedom of neutral commerce with either belligerent is, firstly, the rule, enacted by the Declaration of Paris of 1856, that enemy goods, with the exception of contraband, on neutral vessels on the Open Sea or in enemy territorial waters may not be appropriated by a belligerent.

Oppenheim, Vol. 2, p. 385.

Long experience has shown that, in general, when the principal powers of Europe are engaged in war the rights of neutral nations

are endangered. This consideration led, in the progress of the War of our Independence, to the formation of the celebrated confederacy of armed neutrality, a primary object of which was to assert the doctrine that free ships make free goods, except in the case of articles contraband of war—a doctrine which from the very commencement of our national being has been a cherished idea of the statesmen of this country. At one period or another every maritime power has by some solemn treaty stipulation recognized that principle, and it might have been hoped that it would come to be universally received and respected as a rule of international law. But the refusal of one power prevented this, and in the next great war which ensued—that of the French Revolution—it failed to be respected among the belligerent states of Europe. Notwithstanding this, the principle is generally admitted to be a sound and salutary one, so much so that at the commencement of the existing war in Europe Great Britain and France announced their purpose to observe it for the present; not, however, as a recognized international right, but as a mere concession for the time being. The cooperation, however, of these two powerful maritime nations in the interest of neutral rights appeared to me to afford an occasion inviting and justifying on the part of the United States a renewed effort to make the doctrine in question a principle of international law, by means of special conventions between the several powers of Europe and America. Accordingly, a proposition embracing not only the rule that free ships make free goods, except contraband articles, but also the less contested one that neutral property other than contraband, though on board enemy's ships, shall be exempt from confiscation, has been submitted by this Government to those of Europe and America.

Russia acted promptly in this matter, and a convention was concluded between that country and the United States providing for the observance of the principles announced, not only as between themselves, but also as between them and all other nations which shall enter into like stipulations. None of the other powers have as yet taken final action on the subject. I am not aware, however, that any objection to the proposed stipulations has been made, but, on the contrary, they are acknowledged to be essential to the security of neutral commerce, and the only apparent obstacle to their general adoption is in the possibility that it may be encumbered by inadmissible conditions.

The King of the Two Sicilies has expressed to our minister at Naples his readiness to concur in our proposition relative to neutral rights and to enter into a convention on that subject.

Annual Message of President Pierce, December 4, 1854, Richardson's Messages of the Presidents, V. 275.

On the outbreak of the War with Spain, a step was taken which legally fixed the position of the United States as an adherent of the rule of free ships free goods. By a telegraphic instruction to the diplomatic representatives of the United States, on April 22, 1898, the Department of State declared that, in the event of hostilities, the Government would act upon the second, third, and fourth rules of the Declaration of Paris as "recognized rules of international law."

This position was confirmed by a proclamation issued by the President on April 26, 1898, by which certain rules were promulgated for the observance of officers of the United States during the conflict. Of these, the first two were as follows:

"1. The neutral flag covers enemy's goods, with the exception of contraband of war.

"2. Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag."

Moore's Digest, Vol. VII, pp. 452, 453; Proclamations and Decrees issued during the War with Spain, 77.

Previously to the war with Russia in 1854, it was the British practice to detain any Neutral Vessel the cargo of which was Enemy property; but the right of so doing was waived during the war in question; and by the second clause of the Declaration of Paris of 1856, "the Neutral flag covers Enemy's goods, with the exception of Contraband of War." It must, however, be remembered that "this Declaration is not binding, except between those Powers who have acceded, or shall accede, to it"; and that although most civilized States have acceded to the Declaration, the United States, Spain, Mexico, Venezuela, and Bolivia have not yet done so. In case therefore of a war, in which any of these last-mentioned States should be neutral, their vessels could not, as of right, claim the benefit of the Declaration; nor in case of a war in which any of these States should be belligerent, could the Declaration be invoked in favor of the immunity of cargoes belonging to their subjects on board neutral vessels. A commander must, however, in no case detain a neutral vessel for carriage of enemy's goods, not being contraband, without special instructions.

Holland, pp. 41 and 42.

In exact accordance with the Declaration of Paris of the 4th (16th) April, 1856, the following rules are to be observed in applying these regulations:

\* \* \* \* \*

(2) A neutral flag covers an enemy's goods, with the exception of contraband of war.

Russian Regulations, 1895, Art. 2.

A neutral vessel carrying the goods of an enemy is, with her cargo, exempt from capture, except when carrying contraband of war or endeavoring to evade a blockade.

U. S. Naval War Code, 1900, Art. 19.

The neutral flag covers enemy's goods, with the exception of contraband of war.

Russian Rules, 1904, Section 5.

The rest of the cargo of a neutral ship, inclusive of enemy goods [except contraband and merchandise belonging to their owner] is not confiscable.

German Prize Rules, 1909, Art. 42.

Likewise, cargo belonging to the enemy and found on board of vessels flying a neutral flag shall not be seized as far as it is not contraband of war.

Turkish Regulations, 1912, Chapter 1, Article 1.

Article 2, Declaration of Paris, is substantially identical with section 43, Austro-Hungarian Manual, 1913.

"It is possible that, in the pending negotiations for peace [July, 1797, between Great Britain and France] this principle of *free ships making free goods* may be adopted by all the great maritime powers; in which case, the United States will be among the first of the other powers to accede to it, and to observe it as a universal rule."

Mr. Pickering, Secretary of State, to Mr. J. Q. Adams, July 17, 1797, 2 American State Papers, Foreign Relations, 250.

**Contra.**

While "by the general usage of nations, independent of treaty stipulations, the property of an enemy is liable to capture in the vessel of a friend," it is "not possible to justify this rule upon any sound principle of the law of nations, for by that law the belligerent party has no right to pursue or attack his enemy without the jurisdiction of either of them. The high seas are a general jurisdiction common to all, qualified by a special jurisdiction of each nation over its own vessels. \* \* \* This is universally admitted in time of peace. War gives the belligerent a right to pursue his enemy within the jurisdiction common to both, but not into the special jurisdiction of the neutral power."

Mr. Adams, Secretary of State, to Mr. Anderson, Minister to Colombia, May 27, 1823, Moore's Digest, Volume VII, pp. 444, 445.

"The necessity, however, for urging either the treaty with Colombia or that of 1795 with Spain as a justification of the demand in this case will be obviated if we reflect that the principle of the law of nations violated by the capture of the *Morris* [the principle that free ships make free goods] is one the soundness whereof has always been contended for by the United States and of which no doubt is now entertained."

Mr. Forsyth, Secretary of State, to Mr. Semple, chargé d'affaires to New Granada, February 12, 1839, Moore's Digest, Volume VII, p. 447.

"With respect to the protection of the vessel and cargo by the flag which waves over them, the United States look upon that principle as established, and they maintain that belligerent property, on board a neutral ship, is not liable to capture; and from existing indications they hope to receive the general concurrence of all commercial powers in this position. \* \* \* It is not necessary that a neutral power should have announced its adherence to this declaration [of Paris of 1856] in order to entitle its vessels to the immunity promised. Because the privilege of being protected is guaranteed to belligerents coparties to that memorable act, and protects their property from capture wherever it is found on board a vessel belonging to a nation not engaged in hostilities, \* \* \* such an immunity withheld from this country would in fact operate as a premium, granted to other nations, and would be almost destructive of that important branch of our national industry, the carrying trade."

Mr. Cass, Secretary of State, to Mr. Mason, Minister to France, June 27, 1859, Moore's Digest, Volume VII, p. 450.

**Contra.**

*The "Atlas," 3 C. Rob. 299.* In this case tobacco belonging to a Spaniard, captured on board an American vessel, was condemned as enemy's goods.

**Contra.**

*The "Nereide," 9 Cranch, 288.* The Court said: " \* \* \* the propositions that the neutral flag constitutes no protection to enemy property \* \* \* are necessarily admitted."

*Darby v. The brig "Erstern," 2 Dallas, 34.* In this case the vessel was owned by neutrals, but the cargo was enemy owned, and the ship-owners supplied the vessel with false and colorable papers, assumed the ownership of the cargo, and sent it to a port which had been captured from the enemy. At the time of capture, a capitulation took place by which commercial intercourse between that port and the enemy was prohibited and the voyage of the vessel in question was the outcome of a plan between the shipowners and the cargo owners to circumvent that prohibition.

*Held,* that the ship and cargo was subject to condemnation.

The Court said: "If the *Erstern* had been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be prize; because Congress had said, by their ordinance, that the rights of neutrality shall extend protection to such effects and goods of an enemy."

*Schwartz v. Insurance Co. of North America, 3 Wash. (C. C.) 117.* In this case the court said that international law does not prohibit the carrying of enemies' goods in neutral vessels, and indeed holds that the vessel is entitled to freight upon the condemnation of the goods, but that if a neutral endeavors, by false appearances, to cover the property of a belligerent from the lawful seizure of the enemy, such conduct identifies the neutral with the belligerent whom he thus endeavors to protect, and is a fraud upon the neutrality of his own government and the rights of the belligerent.

*The "Allanton," Russian and Japanese Prize Cases, vol. 1, p. 1.* The Russian Supreme Court held that the cargo (coal) of a British vessel, shipped from a Japanese port to Singapore, was not subject to condemnation, even if it was considered to belong to a Japanese company, since "a neutral flag covers an enemy cargo, provided that it is not contraband, and coal could only be recognized as contraband if it was being conveyed to the enemy or to an enemy port, which was not so in the present case."



NEUTRAL GOODS ON ENEMY'S VESSEL.

Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.—*Article 3, Declaration of Paris.*

**Contra.**

It is likewise agreed that whatever shall be found to be laden by the subjects of either of the two contracting parties, on a ship belonging to the enemies of the other party, the whole effects, although not of the number of those declared contraband, shall be confiscated as if they belonged to the enemy.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, Article XIV.

If any citizens or subjects, with their effects, belonging to either party, shall be found on board a prize vessel taken from an enemy by the other party, such citizens or subjects shall be liberated immediately, and their effects so captured shall be restored to their lawful owners, or their agents.

Treaty of Peace and Amity concluded between the United States and Tripoli, June 4, 1805, Article V.

If either of the parties shall be at war with any nation whatever, and take a prize belonging to that nation, and there shall be found on board subjects or effects belonging to either of the parties, the subjects shall be set at liberty, and the effects returned to the owners.

Treaty of Peace and Friendship, Concluded between the United States and Morocco, September 16, 1836, Article III.

**Contra.**

It is likewise agreed that, in the case where the neutral flag of one of the contracting parties shall protect the property of the enemies of the other, by virtue of the above stipulation, it shall always be understood that the neutral property found on board such enemy's vessels shall be held and considered as enemy's property, and as such shall be liable to detention and confiscation, except such property as was put on board such vessel before the declaration of war, or even afterwards, if it were done without the knowledge of it; but the contracting parties agree that, two months having elapsed after the declaration of war, their citizens shall not plead ignorance thereof. On the contrary, if the flag of the neutral does not protect the enemy's property, in that case the goods and merchandise of the neutral embarked on such enemy's ship shall be free.

Treaty of Peace, Amity, Navigation and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XVI.

The two High Contracting Parties recognize as permanent and immutable the following principles, to wit:

\* \* \* \* \*

2d. That the property of neutrals on board an enemy's vessel is not subject to confiscation, unless the same be contraband of war. They engage to apply these principles to the commerce and navigation of all such Powers and States as shall consent to adopt them on their part as permanent and immutable.

Convention as to Rights of Neutrals at Sea, concluded between the United States and Russia, July 22, 1854, Article I.

The two high contracting parties recognize as permanent and immutable the following principles:

\* \* \* \* \*

That the property of neutrals on board of an enemy's vessel is not subject to detention or confiscation, unless the same be contraband of war; it being also understood that, as far as regards the two contracting parties, warlike articles destined for the use of either of them shall not be considered as contraband of war.

The two high contracting parties engage to apply these principles to the commerce and navigation of all Powers and States as shall consent to adopt them as permanent and immutable.

Convention Declared the Principles of the Rights of Neutrals at Sea, concluded between the United States and Peru, July 22, 1856, Article 1,

The two high contracting parties recognize as permanent and immutable the following principles, to wit:

\* \* \* \* \*

2d. That the property of neutrals on board an enemy's vessel is not subject to confiscation, unless the same be contraband of war.

\* \* \* The contracting parties engage to apply these principles to the commerce and navigation of all such powers and States as shall consent to adopt them as permanent and immutable.

Treaty of Peace, Friendship, Commerce and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XVI.

It is also a principle of the law of nations relative to neutral rights, that the effects of neutrals, found on board of enemy's vessels, shall be free; \* \* \* The principle is to be met with the *Consolato del Mare*, and the property of the neutral is to be restored without any compensation for detention, and the other necessary inconveniences incident to the capture. The former ordinances of France, of 1543, 1585, and 1681, declared such goods to be lawful prize; and Valin justifies the ordinances, on the ground that the neutral, by putting his property on board of an enemy's vessel, favors the enemy's commerce, and agrees to abide the fate of the vessel. But it is fully and satisfactorily shown, by the whole current of modern authority, that the neutral has a perfect right to avail himself of the vessel of his friend, to transport his property; and Bynkershoek has devoted an entire chapter to the vindication of the justice and equity of the right.

Kent, Vol. 1, p. 137; Comm. b. 3, tit. 9, des Prises, art. 7; Consulat de la Mer, par Boucher, ii. c. 276, sec. 1012, 1013; Vattel. b. 3, c. 7, sec. 116; Bynk. c. 13.

\* \* \* the belligerent flag communicates no hostile character to neutral property. States have changed this simple and natural principle of the law of nations, by mutual compact, in whole or in part, according as they believed it to be for their interest; but the one maxim, that *free ships make free goods*, does not necessarily imply the converse proposition, that *enemy ships make enemy goods*. The stipulation, that neutral bottoms shall make neutral goods, is a concession made by the belligerent to the neutral, and gives to the neutral flag a capacity not given to it by the primitive law of nations. On the other hand, the stipulation subjecting neutral property, found in the vessel of an enemy, to confiscation as prize of war, is a concession made by the neutral to the belligerent, and takes from the neutral a privilege he possessed under the pre-existing law of nations; but neither reason nor usage renders the two concessions so indissoluble, that the one cannot exist without the other.

Dana's Wheaton, pp. 576-581.

The third article, [of the Declaration of Paris] that neutral goods not contraband are not seizable under the flag of an enemy, is of little importance, as that was already the law of nations; and the article had only the effect of abrogating clauses to the contrary in subsisting treaties between any of the powers that were parties to it.

Dana's Wheaton, Note 223.

They [the United States] have invariably opposed the rule that *enemy ships make enemy goods*, and their supreme court, as has already been stated, refused to admit it, even against a neutral whose law of prize would subject the property of American citizens to condemnation, when found on board the vessels of her enemy.

Halleck, p. 636; *The Nereide*, 9 Cranch, 388.

**Question whether enemy's "armed" vessels cover neutral goods.**

While the neutral can put his goods on the merchant vessel of either of the belligerents in safety, it has been made a question whether he can make use of their armed vessels for that purpose. The English courts have decided against, and the American courts in favor of the neutral's using such a conveyance for his goods. On the one hand, it may be said that in this act an intention is shown to resist the right of search, and the inconveniences of capture, and of transportation to a port such as the captor may select. On the other hand, the neutral, his goods being safe already, has perhaps no great motive to aid in resistance, for the complete loss of his goods is endangered by an armed engagement. If, however, the neutral can be shown to have aided in the arming of the vessel, it is just that he should suffer.

The decision of this case, as Chancellor Kent observes, is of very great importance. Yet with the discontinuance of privateering such cases would cease, for few ships will be armed with the purpose to resist public ships of war.

Woolsey, p. 318; *The Fanny*, 1 Dodson's Adm. Rep. 443; *The Nereide*, 9 Cranch, 388; *Atalanta*, 3 Wheaton, 415.

Down to the time of the First Armed Neutrality a large number of treaties, for the same reason as in the preceding century, generally stipulated for the condemnation of neutral merchandise in

belligerent vessels; but they seem to have had little effect in changing the bent of opinion in the direction of the practice for which they stipulated. Writers so different as Vattel and Hübner could on this point find themselves in accord, and England was of one mind with the members of the Armed Neutrality. It was impossible for neutrals to ask more than England already spontaneously gave to them, and accordingly the programme of the Armed Neutralities contained no articles on the subject. But in the present century the confiscation of neutral goods reappears in the treaties made by France and the United States, set off as usual against the freedom of enemy's goods in neutral vessels; though at the same time the United States have always distinctly acknowledged that under international common law the goods of neutrals in enemy's vessels are free.

Hall, pp. 742, 743; Vattel, liv. iii, chap. vii, sec. 116; Mr. Pickering to Mr. Pinckney, American State Papers, i, 559.

#### **Incidental losses of neutral owner.**

It is to be noticed that though neutral property in enemy ships possesses immunity from confiscation, the neutral owner is not protected against loss arising incidentally out of the association with belligerent property in which he has chosen to involve his merchandise. Just as a neutral individual in belligerent territory must be prepared for the risks of war and cannot demand compensation for loss or damage of property resulting from military operations carried on in a legitimate manner; so, if he places his property in the custody of a belligerent at sea, he can claim no more than its bare immunity from confiscation, and he is not indemnified for the injury accruing through loss of market and time, when it is taken into the captor's port, or in some cases at any rate for loss through its destruction with the ship.

Hall, pp. 743, 744.

#### **Rights of neutral cargo-owner when vessel destroyed.**

In 1872 the French Prize Court gave judgment in a case, arising out of the war of 1870-1, in which the neutral owners of property on board two German ships, the *Ludwig* and the *Vorwärts*, which had been destroyed instead of being brought into port, claimed restitution in value. It was decided that though 'under the terms of the Declaration of Paris neutral goods on board an enemy's vessel cannot be seized, it only follows that the neutral who has embarked his goods on such vessel has a right to restitution of his merchandise, or in case of sale to payment of the sum for which it may have been sold; and that the Declaration does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture'; in the particular case 'the destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because, from the large number of prisoners on board, no part of the crew could be spared for the navigation of the prize, such destruction was an act of war the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity.'

It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might under some circumstances amount to an indirect repudiation of the Declaration of Paris. In the case for example of a state the ships of which were largely engaged in carrying trade, a general order given by its enemy to destroy instead of bringing in for condemnation would amount to a prohibition addressed to neutrals to employ as carriers vessels, the right to use which was expressly conceded to them by the Declaration in question. It was undoubtedly intended by that Declaration that neutrals should be able to place their goods on board belligerent vessels without as a rule incurring further risk than that of loss of market and time, and it ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize court, and not merely to allege, that he has acted under the pressure of a real military necessity.

Hall, pp. 744, 745; Calvo, sec. 2817.

\* \* \* the contents of the duty of belligerents to treat neutrals in accordance with their impartiality are so manifest that elaborate treatment is unnecessary. Such duty *excludes* \* \* \* secondly, the appropriation of neutral goods, contraband excepted, on enemy vessels.

Oppenheim, vol. 2, p. 384.

The vessel [of an enemy] will be condemned, as also will Enemy cargo. Neutral cargo will be free (except Contraband).

Holland, p. 12.

In exact accordance with the Declaration of Paris of the 4th (16th) April, 1856, the following rules are to be observed in applying these Regulations:—

\* \* \* \* \*

(3) Neutral goods, with the exception of contraband of war, are not subject to confiscation under an enemy's flag; \* \* \*

Russian Regulations, 1895, Article 2.

Ships of war and merchant-vessels of the enemy are subject to confiscation as prizes, as well as all articles on board, except—

\* \* \* \* \*

(2) Such as belong to the Government of a neutral Power or to its subjects, and do not constitute contraband of war. \* \* \*

*Observation.*—All property found in an enemy's ship is to be considered as enemy's property unless the contrary is proved.

Russian Regulations, 1895, Article 10.

Neutral goods, with the exception of contraband of war, may not be seized under the enemy's flag.

Russian Rules, 1904, sec. 5.

**Exception as to armed ships.**

If, however, the ship [belonging to the enemy] is equipped for fighting, the whole of the cargo shall be condemned.

Japanese Regulations, 1904, Article 40.

War and merchant vessels belonging to the enemy, including their cargo, shall be seized and confiscated. Only cargo belonging to neutral nations and to the subjects of the latter shall not be seized as far as it is not contraband of war.

Turkish Regulations, 1912, ch. 1, Art. 1.

Article 3, Declaration of Paris, is substantially identical with section 44, Austro-Hungarian Manual, 1913.

*The "Nereide," 9 Cranch, 388.*—The Court said: "The rule \* \* \* that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States \* \* \*. In the practical application of this principle, so as to form the rule, the propositions \* \* \* that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted."

**Goods on board armed vessel.**

*The "Atalanta," 3 Wheat., 409.*—This was a case of cargo belonging to a Frenchman, found on board an armed British vessel, captured by an American man-of-war.

Held that the mere fact that a neutral cargo is found on board an armed vessel of the enemy is not a ground for condemnation.

*Cargo ex Mukden, Russian and Japanese Prize Cases, vol. 2, p. 12.*—It was held by the Japanese Prize Court that goods captured on a Russian steamer and which had been shipped by neutral and Japanese subjects to neutral subjects in Corea should be released.

#### NOTIFICATION OF WAR TO NEUTRALS.

The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.—*Hague Convention III, 1907, Article 2.*

The right to take prizes does not accrue to the belligerents until after the commencement of hostilities. It ceases during an armistice and with the preliminary negotiations for peace. So far as neutrals are concerned the right to take prize cannot be exercised until the belligerents have notified the neutrals that war exists.

Institute, 1882, p. 46.

There is nothing in international jurisdiction, as now practiced, to render such declaration [of war] obligatory, and the present usage entirely dispenses with it. All, however, agree that there should be some manifesto, declaration, or publication made within the territory of the state which declares the war, announcing the existence of hostilities; and such manifesto, or publication, usually sets forth the motives for commencing the war. Some such formal act, proceeding from the competent authority, seems necessary in order to announce to the people at home, and to apprise neutral nations of, the war, for their instruction and direction in respect to their intercourse with the enemy. \* \* \* Moreover neutral states have a right to know, by some formal and authoritative act, that hostilities exist in form as well as in fact, on account of the interests of their own subjects, whose duties and relations to the belligerents are essentially changed by the new conditions of things. It is not material under what form such notice is given, whether by proclamation, or by a mere act of the legislative branch of the government.

Halleck, pp. 352, 353.

Where there has been no official declaration of war, and no notification by manifesto of its actual existence, the conduct of neutrals is entitled to the most favorable construction, and neutral property cannot be condemned, for violation of neutral duty, without proof that the war *de facto* was so public and notorious that the neutral could not have been in ignorance of its existence. But where such knowledge is actually brought home to him, it seems to us to place him in the same position, with respect to the character of his acts, as if an official declaration or manifesto had been issued.

Halleck, p. 370.

Neutrals have a right to know that a state of war exists, and that early enough to adjust their commercial transactions to the altered state of things; otherwise a great wrong may be done them. [Their duties as neutrals date from this official announcement of a state of war or other positive knowledge of it]. Such notice is given in manifestoes.

Woolsey, p. 192.

It was shown in an earlier chapter that as between belligerents no necessity exists for a notification that war has begun or is about to begin. As between belligerents and neutrals, however, the case stands differently. As a matter of courtesy it is due to the latter as friends that a belligerent shall not if possible, allow them to find out incidentally and perhaps with uncertainty that war has commenced, but that they shall be individually informed of its existence. As a matter of law they can only be saddled with duties and exposed to liabilities from the time at which they have been affected with knowledge of the existence of war; when there is no privity between two persons, one can not impose duties or liabilities upon the other by doing an act without the knowledge of the person intended to be affected.

Hence it is in part that it has long been a common practice to address a manifesto to neutral states, the date of which serves to fix the moment at which war begins; and it is evident that when practicable the issue of such a manifesto is the most convenient way of bringing the fact of war to their knowledge. Where war breaks out at a moment which is not determined by the respective governments engaged, or by that which has just done acts of war; as for example when it results from conditional orders given to an armed force, or from an act of self-preservation or pacific intervention being regarded as hostile, a manifesto can not of course be issued before its commencement. But in such cases a belligerent can not expect states to take up the attitude of neutrality contemporaneously with the outbreak of hostilities; even when he has reason to think that the existence of war is known it is his clear duty to give every indulgence to neutrals; and where war breaks out through the performance of an act which one of the two parties elects to consider hostile, the date of its commencement, though carried back as between the belligerents to the occurrence of the hostile act, must be taken as against neutrals to be that of the election through which third powers become acquainted with the fact of war. Hence war can never so exist as to throw upon neutrals their ordinary duties and liabilities without opportunity for the issue of a manifesto having arisen; and though to give express notice, whether in that or in any other form, is merely an act of courtesy, because it is the fact of knowledge however acquired which constitutes the ground of neutral duty, it is evident that the omission of notice may be productive of so much inconvenience and even of loss to neutrals, through the doubt in which they may for some time be left, that the issue of a manifesto is as obligatory as an act of courtesy can well be.<sup>1</sup>

Hall, pp. 596, 597.

<sup>1</sup> Cf. however sec. 168 \*. What is said above as to the moment from which states, and therefore their subjects, become affected by the consequences of non-neutral actions does not apply to cases in which neutral persons are engaged knowingly or even ignorantly in carrying out a naval or military operation for an intending belligerent.



If there has been a declaration of war, whether expressly to the enemy or by a manifesto, it is in practice communicated to third powers; although the publicity of a manifesto might make it as suitable for the purpose of notice against neutrals as against the enemy. If the declaration of war has been conditional, the fact that the time fixed by it has expired without the ultimatum being complied with will not be of so public a nature as to amount to notice to third powers, and it must be communicated to them. And in any case the communication to a third power will bind its subjects, it being the duty of every government to give the publicity necessary for the protection of its subjects to all international events of which it is apprised. If as between the belligerents the state of war is dated from the first act of force which either side chooses to regard as war, that antedating can have no effect as against third powers or their subjects. But it will not follow that if there has been no declaration of war, or if there has been a failure in the duty of communicating such a declaration, third powers and their subjects can escape the duties of neutrality during the whole of the contest. If they know the existence of the war, or if it is so notorious that they must be held to have known it, they will be bound by those duties. This is taught by all writers, and was applied by the Italian prize court, 8 December 1896, to justify the capture of the Dutch ship *Doelwyk*, carrying contraband during a *de facto* war between Italy and Abyssinia which had not been declared.

Westlake, vol. 2, p. 30; article by Brusa in 4 *Revue Générale*, 157-175.

The reference to neutral powers in the second article of the Convention [Hague, III] is a recognition of the fact that their interests, as well as those of belligerents, are involved in the substitution of a state of war for a state of peace. When the change comes, it involves both neutral governments and neutral individuals in a complex of new obligations, and confers on them a number of new rights. Obviously it is most important that they should know the exact time when the alteration in their legal position takes effect. The parties to the struggle are, therefore, bound to send them without delay notification of the outbreak of war, a message by telegraph being deemed sufficient. Without such notification belligerents cannot enforce their rights against neutrals, unless they are able to show that the requisite knowledge has been acquired in some other way. With modern means of communication a war is not a thing that can be kept concealed. Its existence would be known all over the world in a very short time. But nevertheless the rule that neutrals are not liable for breach of neutrality till knowledge of the outbreak of war has been brought home to them, might affect the validity of captures made at sea in the first outburst of a maritime conflict. In addition to the mere notification required by the Convention, belligerents will probably continue to issue the manifestoes it has long been customary for them to publish in their own territories, as a warning to their subjects and a justification of themselves before the world. And doubtless copies of these manifestoes will be sent, as heretofore, to neutral governments.

Lawrence, pp. 350-351.

Since neutrality is an attitude of impartiality deliberately taken up by a State not implicated in a war, neutrality cannot begin before the outbreak of war becomes known. It is only then that third States can make up their minds whether or not they intend to remain neutral. They are supposed to remain neutral, and the duties deriving from neutrality are incumbent upon them so long as they do not *expressis verbis* or by unmistakable acts declare that they will be parties to the war. It had long been the usual practice on the part of belligerents to notify the outbreak of war to third States for the purpose of enabling them to take up the necessary attitude of impartiality, but such notification was not formerly in strict law necessary. The mere fact of the knowledge of the outbreak of war which had been obtained in any way gave a third State an opportunity of making up its mind regarding the attitude which it intended to take up, and, if it remained neutral, its neutrality was to be dated from the time of its knowledge of the outbreak of war. But it is apparent that an immediate notification of the war on the part of belligerents is of great importance, as thereby all doubt and controversy regarding the knowledge of the outbreak of war are excluded. For the fact must always be remembered that a neutral State may in no way be made responsible for acts of its own or of its subjects which have been performed before it knew of the war, although the outbreak of war might be expected. For this reason article 2 of Convention III. of the Second Peace Conference enacts that belligerents must without delay send a notification of the outbreak of war, which may even be made by telegraph, to neutral Powers, and that the condition of war shall not take effect in regard to neutral Powers until after receipt of a notification, unless it be established beyond doubt that they were in fact aware of the outbreak of war.

Oppenheim, vol. 2, pp. 373-374.

SUBMARINE CABLES CONNECTING OCCUPIED AND NEUTRAL TERRITORY.

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.—*Hague Convention IV, 1907, Article 54.*

It would be very advantageous if the several States would agree to declare that the destruction or injury of submarine cables in the high seas is an offense against the law of nations, and to determine in a precise manner the criminal character of the acts and the applicable penalties; with regard to this latter point a degree of uniformity compatible with the diversity of criminal legislations would be sought.

The right of seizing persons who are guilty or presumed to be guilty might be granted to government ships of all nations under conditions regulated by treaties; but the right to pass judgment upon them should be reserved to the national courts of the captured vessel.

A submarine telegraphic cable uniting two neutral territories is inviolable.

It is desirable, when telegraphic communications must cease by reason of a state of war, that the measures taken be only those strictly necessary to prevent use of the cable and that they be withdrawn, or that their consequences be repaired, as soon as cessation of hostilities permits.

Institute, 1879, pp. 24, 25.

1. A submarine cable connecting two neutral territories is inviolable.

2. A cable connecting the territories of two belligerents or two parts of the territory of one of the belligerents may be cut anywhere except in the territorial sea and in the neutralized waters appertaining to a neutral territory ("neutralized" by treaty or by declaration in accordance with Article 4 of the Paris resolutions of 1894).

3. A cable connecting a neutral territory with the territory of one of the belligerents can in no case be cut in the territorial sea or in the neutralized waters appertaining to a neutral territory.

On the high seas such a cable can only be cut if there is an effective blockade and within the limits of the line of blockade, subject to the repair of the cable within the briefest possible time. Such a cable can always be cut in the territory and in the territorial sea appertaining to enemy territory up to the distance of three marine miles from low-water mark.

4. It is understood that the liberty of the neutral State to transmit dispatches does not imply the right to make use or permit use thereof manifestly for the purpose of lending assistance to one of the belligerents.

5. In applying the preceding rules, no difference is to be made between State cables and cables owned by individuals, nor between cables which are enemy property and those which are neutral property.

Institute, 1902, p. 162.

In the conditions stated below, belligerent States are authorized to destroy or to seize only the submarine cables connecting their territories or two points in these territories, and the cables connecting the territory of one of the nations engaged in the war with a neutral territory.

The cable connecting the territories of the two belligerents or two points in the territory of one of the belligerents, may be seized or destroyed throughout its length, except in the waters of a neutral State.

A cable connecting a neutral territory with the territory of one of the belligerents may not, under any circumstances, be seized or destroyed in the waters under the power of a neutral territory. On the high seas, this cable may not be seized or destroyed unless there exists an effective blockade and within the limits of that blockade, on consideration of the restoration of the cable in the shortest time possible. This cable may be seized or destroyed on the territory of and in the waters belonging to the territory of the enemy for a distance of three marine miles from low-tide. Seizure or destruction may never take place except in case of absolute necessity.

In applying the preceding rules no distinction is to be made between cables, according to whether they belong to the State or to individuals; nor is any regard to be paid to the nationality of their owners.

Submarine cables connecting belligerent territory with neutral territory, which have been seized or destroyed, shall be restored and compensation fixed when peace is made.

Institute, 1913, p. 188.

As the "International Convention for the Protection of Submarine Telegraph Cables" of 1884 expressly stipulates by article 15 that freedom of action is reserved to belligerents, the question is not settled how far belligerents are entitled to interfere with submarine telegraph cables. The only conventional rule concerning this question is article 54 of the Hague Regulations, inserted by the Second Peace Conference, which enacts that submarine cables connecting occupied enemy territory with a neutral territory shall not be seized or destroyed, and that, if a case of absolute necessity has compelled the occupant to seize or destroy such cable, it must be restored after the conclusion of peace and indemnities paid. There is no rule in existence which deals with other possible cases of seizure and destruction.

Oppenheim, vol. 2, p. 271.

The following rules are to be followed with regard to submarine telegraphic cables in time of war, irrespective of their ownership:

(a) Submarine telegraphic cables between points in the territory of an enemy, or between the territory of the United States and that of an enemy, are subject to such treatment as the necessities of war may require.

(b) Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy.

(c) Submarine telegraphic cables between two neutral territories shall be held inviolable and free from interruption.

U. S. Naval War Code, 1900, Article 5.

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#### INVIOABILITY OF NEUTRAL TERRITORY.

**The territory of neutral Powers is inviolable.**—*Hague Convention V, 1907, Article 1.*

It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it.

Kent, vol. 1, p. 124.

No use of neutral territory, for the purposes of war, can be permitted.

Kent, vol. 1, p. 125.

No act of hostility is to be commenced on neutral ground. No measure is to be taken that will lead to immediate violence.

Kent, vol. 1, p. 126.

There is no exception to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful.

Kent, vol. 1, p. 127.

The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory belonging to no one. Hence it follows, that hostilities can not lawfully be exercised within the territorial jurisdiction of the neutral State, which is the common friend of both parties.

Dana's Wheaton, p. 520.

There is, then, no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful.

Dana's Wheaton, p. 524.

\* \* \* the government of the United States has invariably claimed the absolute inviolability of neutral territory.

This question was revived and elaborately discussed in the case of the steamboat "Caroline," which was captured and destroyed by British armed forces while in American territory, in the winter of 1838. This vessel had been employed by a body of Canadian insurgents, in conveying passengers and munitions of war from the frontier of the state of New York to the British ground of Navy Island. The commander of the expedition, from the Canada side, sent to capture this vessel, expected to find her within British territory, but on coming round the point of the island in the night, he first discovered that the vessel was moored on the American shore. He nevertheless proceeded to make the capture and to destroy the vessel, although then within the neutral territory, and his conduct was ap-

proved by his government. This led to remonstrance on the part of the United States. It was said, that if, upon a full investigation of all the facts, it should appear that the owner of the vessel had been governed by a hostile intent, or had made common cause with the occupants of Navy Island, the United States would prosecute no claim to indemnity for the destruction of this boat; but that the lawfulness, or unlawfulness of the employment in which the "Caroline" was engaged, however settled, in no manner involved the higher consideration of the violation of territorial sovereignty and jurisdiction. In the discussion which followed, Mr. Webster, while claiming absolute immunity of neutral territory against aggression from either of the belligerents, admitted that the necessity of *self-defense* might justify hostility in the territory of a neutral power; but that it was required of the English government, as the aggressor in this case, "to show a necessity of self defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation." It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it." Lord Ashburton agreed with Mr. Webster, on the inviolability of neutral or independent territory, and on the possible exception to which that principle was liable—the necessity of self-defense, as the first law of our nature,—and that the suspension of that great principle "must be for the shortest possible period, during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity." He, however, contended that there was "that necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation," which preceded the destruction of the Caroline while moored to the shore of the United States, that "it must be admitted that there was, in the hurried execution of the necessary seizure, a violation of territory," and that it was "to be regretted that some explanation and apology for this occurrence was not immediately made" to the United States, by the British government. These acknowledgments and assurances were received as satisfactory by the United States, and the subject was not further discussed by the two governments.

Halleck, pp. 520–522; Webster, Dip. and Off. Papers, pp. 112–120; Phillimore, On Int. Law, vol. 3, sec. 38.

Neutrals have a right, 1. To insist that their territory shall be inviolate and untouched by the operations of war, and their rights of sovereignty uninvaded. And if violations of their rights are committed, they have a right to punish the offender on account of them, or to demand satisfaction from his government. They are in a manner bound to do this, because otherwise their neutrality is of no avail, and one of the belligerents enjoys the privilege of impunity.

Woolsey, p. 281.

Every nation is bound to pass laws whereby the territory and other rights of neutrals shall be secured, and has a right to demand security for itself in the same manner.

Woolsey, pp. 283, 284.

Neutral land and neutral territorial waters are sacred. No acts of warfare may lawfully take place within them.

Lawrence, p. 608.

**Difficulty, in some cases, of determining what is neutral territory.**

There remains, however, a difficulty connected with the double or ambiguous character of sovereignty in certain cases. Fortunately these cases have tended to decrease in number with the simplification of the political condition of modern Europe, though it may well be doubted whether recent assumptions of protectorates in Africa will not add to them in the future. They occur when two or more powers can each claim authority over certain territory. If one of them be belligerent and the other neutral, it is difficult to tell how the territory is to be regarded for war purposes. The protectorate exercised by Great Britain over the Ionian Islands gave rise to such a difficulty during the early part of the Crimean War, when the *Leucade*, an Ionian vessel, was captured by a British cruiser and brought in for adjudication before a prize court on a charge of trading with Russia, the enemy of Great Britain in the war. It was contended that, since the Ionian Islands were under a British protectorate, they were parties to the war and their vessels were forbidden to engage in commerce with the enemy. But Dr. Lushington, who tried the case, held that the Ionian republic was not a party to the war. It had a commercial flag of its own, and, though Great Britain occupied its fortresses and had control of its diplomatic arrangements, it was not involved in the public acts of the British Government unless specially included. There had been no special inclusion in the case of the then existing war. British vessels had been forbidden to trade with Russia, but Ionian vessels had not. He, therefore, restored the vessel, but would not give costs against the captors on the ground that the point was a very difficult one and that they acted in perfect good faith. The cession of the Ionian Islands to Greece in 1864 has rendered a repetition of the case impossible, but we may venture to point out with regard to it that the judgment seemed to leave the determination of the status of the island republic exclusively in the hands of one of the belligerents. It is possible to imagine circumstances in which this would have operated unfairly towards the other. If, for instance, Great Britain had used the islands as a depot and base of naval operations and at the same time claimed immunity for their commerce as being neutral, Russia would have had good cause to complain. In discussing cases of double or ambiguous sovereignty, Hall lays down the rule that the use to which a place is put by the power that exercises *de facto* control over it determines whether it should be regarded as neutral or belligerent territory. This test is at once simple, effective, and fair as between the hostile powers; and we may hope that it will be adopted in all future cases.

Lawrence, pp. 385, 386; Spinks, Admiralty Reports, vol. 2, p. 212.

\* \* \* the duty of belligerents to treat neutrals in accordance with their impartiality \* \* \* excludes, firstly, any violation of neutral territory for military or naval purposes of the war.

Oppenheim, vol. 2, p. 384.



The territory of neutral States is available for none of the belligerents for the conduct of its military operations.

German War Book, p. 188.

The belligerent States have to respect the inviolability of the neutral and the undisturbed exercise of its sovereignty in its home affairs, to abstain from any attack upon the same, even if the necessity of war should make such an attack desirable. Neutral States, therefore, possess also the right of asylum for single members or adherents of the belligerent Powers, so far as no favor to one or other of them is thereby implied. Even the reception of a smaller or larger detachment of troops which is fleeing from pursuit does not give the pursuer the right to continue his pursuit across the frontier of the neutral territory.

German War Book, p. 197.

Every neutral State can, so long as it itself keeps faith, demand that the same respect shall be paid to it as in time of peace. It is entitled to the presumption that it will observe strict neutrality and will not make use of any declarations or other transactions as a cloak for an injustice against one belligerent in favor of the other, or will use them indifferently for both. This is particularly important in regard to Passes, Commissions, and credentials issued by a neutral State.

German War Book, p. 198.

Article 1, Hague Convention V, 1907, is apparently identical with section 228, Austro-Hungarian Manual, 1913.

With reference to a report that the troops of General Diaz, after defeating and routing their adversaries on Mexican soil, pursued them into Texas, where they again attacked and dispersed them, Mr. Evarts instructed the American minister in Mexico: "While it is deemed hardly probable that this unjustifiable invasion of American soil was made in obedience to any specific orders from the Mexican capital, it is, nevertheless, a grave violation of international law, which can not, for a moment, be overlooked. You are instructed to call the attention of the officers of the *de facto* Government with whom you are holding unofficial intercourse to this case, and to say that the Government of the United States will confidently expect a prompt disavowal of the act, with reparation for its consequences, and the punishment of its perpetrators."

Mr. Evarts, Secretary of State, to Mr. Foster, Minister to Mexico, June 21, 1877, For. Rel. 1877, 413.

**Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.—Hague Convention V, 1907, Article 2.**

**Qualification.**

No belligerent power can claim the right of passage through a neutral territory, unless founded upon a previous treaty.

Kent, vol. 1, p. 127.

By the common law of nations, the land forces of the combatants are not allowed to cross a neutral frontier, and the Hague Convention of 1907 on neutrality in land warfare places a wide construction on the prohibition.

Lawrence, p. 622.

The definite prohibition in a great law-making document of the passage of troops through neutral territory puts an end to a controversy which has lasted from the days of Grotius, who upheld a right of passage, to recent times when the great majority of writers denied it.

Lawrence, p. 635.

The very first distinction to be made between different kinds of neutrality is that between perpetual or other neutrality. Perpetual or permanent is the neutrality of States which are neutralized by special treaties of the members of the Family of Nations; as at the present time that of Switzerland, Belgium, and Luxemburg. Apart from duties arising from the fact of their neutralisation which are to be performed in time of peace as well as in time of war, the duties and rights of neutrality are the same for neutralized as for other States. It must be specially observed that this concerns not only the obligation not to assist either belligerent, but likewise the obligation to prevent them from making use of the neutral territory for their military purposes. Thus, Switzerland in 1870 and 1871, during the Franco-German war, properly prevented the transport of troops, recruits, and war material of either belligerent over her territory.

Oppenheim, vol. 2, p. 368.

\* \* \* during the second half of the nineteenth century it became controversial whether a so-called qualified neutrality was neutrality at all, and whether a State, which, in fulfillment of a treaty obligation, rendered some assistance to one of the belligerents, violated its neutrality. The majority of modern writers maintained, correctly I think, that a State was neither neutral or not, and that a State violated its neutrality in case it rendered any assistance whatever to one of the belligerents from any motive whatever. \* \* \* All doubt in the matter ought now to be removed, since Article 2 of Convention V. of the Second Peace Conference categorically enacts that "belligerents are forbidden to move across the territory of a neutral Power troops or convoys either of munitions of war or of supplies." The principle at the back of this enactment no doubt is that a qualified neutrality has no longer any *raison d'être*, and that neutrality must in every case be perfect.

Oppenheim, vol. 2, pp. 370-371.

Article 2, Hague Convention V, 1907, is substantially identical with section 229, Austro-Hungarian Manual, 1913.

**ESTABLISHMENT OR USE ON NEUTRAL TERRITORY OF APPARATUS FOR COMMUNICATION  
WITH BELLIGERENT FORCES—PROHIBITED TO BELLIGERENT.**

**Belligerents are likewise forbidden to:**

- (a) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;
- (b) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.—*Hague Convention V, 1907, Article 3.*

In 1904, during the siege of Port Arthur, the Russians erected a wireless telegraphy station in the neutral Chinese port of Chefoo, and thus established communication with the beleaguered fortress. Such an act is now expressly forbidden, and the duty of preventing it laid on the neutral government.

Lawrence, p. 647.

The case which occurred in 1904, during the Russo-Japanese war and the siege of Port Arthur, when the Russians installed an apparatus for wireless telegraphy in Chifu and communicated thereby with the besieged, constituted a violation of neutrality.

Oppenheim, vol. 2, p. 436.

Article 3, Hague Convention V, 1907, is substantially identical with section 230, Austro-Hungarian Manual, 1913.

FORMING CORPS AND OPENING RECRUITING STATIONS ON NEUTRAL TERRITORY—PROHIBITED TO BELLIGERENT.

**Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.**—*Hague Convention V, 1907, Article 4.*

[In 1793], the Minister of France asserted the right \* \* \* of enlisting men, within the neutral territory of the United States. Examining this question under the law of nations and the general usage of mankind, the American government produced proofs, from the most enlightened and approved writers on the subject, that a neutral nation must, in respect to the war, observe an exact impartiality towards the belligerent parties; that favors to the one, to the prejudice of the other, would import a fraudulent neutrality, of which no nation would be the dupe; that no succor ought to be given to either, unless stipulated by treaty, in men, arms, or any thing else, directly serving for war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power can levy men within the territory without its consent; \* \* \*

Dana's Wheaton, p. 519; Mr. Jefferson's letter to M. G. Morris, August 16, 1793; Waite's State Pap. 1, 140.

It was stated [by the United States Government in 1793] that if the neutral power might not, consistently with its neutrality, furnish men to either party for their aid in war, as little could either enrol them in the neutral territory. The authority both of Wolfius and Vattel was appealed to in order to show, that the levying of troops is an exclusive prerogative of sovereignty, which no foreign power can lawfully exercise within the territory of another State, without its express permission.

Dana's Wheaton, p. 533.

The same objection was made by the United States, in the war of 1793, against the enlisting of men by the respective belligerent powers within our ports, and it was declared that if the neutral state might not, consistently with its neutrality, furnish men to either party for their aid in war, it was equally unlawful for either belligerent to enrol them in the neutral territory. Wolfius says that "it is not permitted to raise soldiers on the territory of another, without the consent of its sovereign." Vattel says that, "As the right of levying soldiers belongs solely to the nation or the sovereign, no person must attempt to enlist soldiers in a foreign country, without the permission of the sovereign."

Halleck, p. 525.

During the late Crimean war it came to light that certain British consuls were persuading persons within our bounds to go out of the

United States in order to enlist in that service, and that the minister at Washington was aiding therein. It could not be complained of, if the United States government showed displeasure at such proceedings, demanded his removal, and even ceased to hold communication with him as the agent of the British Government. In what, now, did his offense consist,—in a breach of our law only or in a violation of international law? In answer it may be said, that if the earlier usage is to decide, there was no direct breach of international law; if the more modern, there was a breach. But supposing this to be doubtful, in breaking our laws of neutrality, which have the peculiar character of supporting the laws of nations, and that too when he was the representative of another sovereignty, he attacked the sovereignty of the nation, and in this way came in conflict with law international, which aims to secure the sovereignty of all the nations who acknowledge it. And even if our law could have been evaded by inducing men to go abroad for another object, and there persuading them to enlist in a war against one of our friends, there would still have remained ground of complaint against the agents in such a scheme, as disturbers of our relations with a friendly power.

Woolsey, pp. 288, 289.

The fighting forces of a belligerent may not be reinforced or recruited in neutral territory.

Lawrence, p. 617.

While the laws of the Union are thus peremptory in their prohibition of the equipment or armament of belligerent cruisers in our ports, they provide not less absolutely that no person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered, in the service of any foreign state, either as a soldier or as a marine or seaman on board of any vessel of war, letter of marque, or privateer. And these enactments are also in strict conformity with the law of nations, which declares that no state has the right to raise troops for land or sea service in another state without its consent, and that, whether forbidden by the municipal law or not, the very attempt to do it without such consent is an attack on the national sovereignty.

Such being the public rights and the municipal law of the United States, no solicitude on the subject was entertained by this Government when, a year since, the British Parliament passed an act to provide for the enlistment of foreigners in the military service of Great Britain. Nothing on the face of the act or in its public history indicated that the British Government proposed to attempt recruitment in the United States, nor did it ever give intimation of such intention to this Government. It was a matter of surprise, therefore, to find subsequently that the engagement of persons within the United States to proceed to Halifax, in the British province of Nova Scotia, and there enlist in the service of Great Britain, was going on extensively, with little or no disguise. Ordinary legal steps were immediately taken to arrest and punish parties concerned, and so put an end to acts infringing the municipal law and derogatory to our sovereignty. Meanwhile suitable representations on the subject were addressed to the British Government.

Thereupon it became known, by the admission of the British Government itself, that the attempt to draw recruits from this country originated with it, or at least had its approval and sanction; but it also appeared that the public agents engaged in it had "stringent instructions" not to violate the municipal law of the United States.

It is difficult to understand how it should have been supposed that troops could be raised here by Great Britain without violation of the municipal law. The unmistakable object of the law was to prevent every such act which if performed must be either in violation of the law or in studied evasion of it; and in either alternative, the act done would be alike injurious to the sovereignty of the United States.

In the meantime the matter acquired additional importance by the recruitments in the United States not being discontinued, and the disclosure of the fact that they were prosecuted upon a systematic plan devised by official authority; that recruiting rendezvous had been opened in our principal cities and depots for the reception of recruits established on our frontier, and the whole business conducted under the supervision and by the regular cooperation of British officers, civil and military, some in the North American provinces and some in the United States. The complicity of those officers in an undertaking which could only be accomplished by defying our laws, throwing suspicion over our attitude of neutrality, and disregarding our territorial rights is conclusively proved by the evidence elicited on the trial of such of their agents as have been apprehended and convicted. Some of the officers thus implicated are of high official position, and many of them beyond our jurisdiction, so that legal proceedings could not reach the source of the mischief.

These considerations, and the fact that the cause of complaint was not a mere casual occurrence, but a deliberate design, entered upon with full knowledge of our laws and national policy and conducted by responsible public functionaries, impelled me to present the case to the British Government, in order to secure not only a cessation of the wrong, but its reparation. The subject is still under discussion, the result of which will be communicated to you in due time.

Annual message of President Pierce, December 3, 1855, Richardson's Messages of the President, 1, 332.

It was held by the Attorney General of the United States in 1855 that the undertaking of a belligerent to enlist troops of land or sea in a neutral state without the previous consent of the latter is a hostile attack on its national sovereignty and that the act of Congress prohibiting foreign enlistments is a matter of domestic or municipal right as to which foreign governments have no right to inquire, the international offense being independent of the question of the existence of a prohibitory act of Congress.

7 Op. Atty. Gen., 367.

Also the organization of troops and the assembling of "Freelances" on the territory of neutral States is not allowed by the law of nations.

German War Book, p. 189.

Article 4, Hague Convention V, 1907, is substantially identical with section 231, Austro-Hungarian Manual, 1913.

MOVEMENT OF TROOPS OR CONVOY ACROSS NEUTRAL TERRITORY—NEUTRAL PROHIBITED FROM ALLOWING.

**A neutral Power must not allow [belligerents to move troops or convoys of either munitions of war or supplies across its territory.]—*Hague Convention V*, 1907, *Article 5*.**

Contra.

When the war between Great Britain and the Transvaal began, free passage was given by Portugal to British troops through Beira to Rhodesia. This permission was based on the Anglo-Portuguese treaty of June 11, 1891. By Art. XII. of this treaty Portugal "engages to permit and to facilitate transit for all persons and goods of every description over the waterways of the Zambesi, the Shire, the Pungive, the Busi, the Limpopo, the Sabi, and their tributaries, and also over the landways which supply means of communication where these rivers are not navigable." By Art. XIV. Portugal agrees "to grant absolute freedom of passage between the British sphere of influence and Pungive Bay for all merchandise of every description, and to give the necessary facilities for the improvement of the means of communication," and also "to construct a railway between Pungive and the British sphere."

Moore's Digest, vol. vii, pp. 939, 940; 83 Br. and For. State Papers, 1890, 1891, 27, 35, 36, 38; Hertslet's Commercial Treaties, xix, 777.

Contra.

The right of a refusal of a pass over neutral territory to the troops of a belligerent power depends more upon the inconvenience falling on the neutral state, than on any injustice committed to the third party, who is to be affected by the permission or refusal. It is no ground of complaint against the intermediate neutral state if it grants a passage to belligerent troops, though inconvenience may thereby ensue to the adverse belligerent. It is a matter resting in the sound discretion of the neutral power, who may grant or withhold the permission, without any breach of neutrality.

Kent, vol. 1, p. 126-127.

Contra.

This exemption [of neutral territory from hostilities] extends to the passage of an army \* \* \* through the limits of the territorial jurisdiction, which can hardly be considered an innocent passage, such as one nation has a right to demand from another; and, even if it were such an innocent passage, is one of those *imperfect* rights, the exercise of which depends upon the consent of the proprietor, and which cannot be compelled against his will. It may be granted or withheld, at the discretion of the neutral State; but its

being granted is no ground of complaint on the part of the other belligerent power, provided the same privilege is granted to him, unless there be sufficient reasons for withholding it.

Dana's Wheaton, p. 520.

Modern writers, except some of the German school, express strongly the opinion, that for a neutral to permit an army of a belligerent to pass over its territory for a purpose of war, would be so far an abandonment of neutrality. A special license in a particular case to one belligerent would not be justified by an offer to grant a special license in a like case to the other; for the exigency, the means of using the license, and the advantages to be gained by it, are too varying to insure equality: and it can hardly be supposed that a neutral will grant a general license of passage to both parties, at their option.

Note 205, Dana's Wheaton, p. 520.

It was contended by some of the ancient publicists that a belligerent had an absolute right of passage for his troops through neutral territory, and that the neutral could not refuse it without injustice. But Vattel contends that such *innocent passage* through neutral territory may be granted or refused by the neutral power, at its discretion; that, if refused, the applicant has no cause of complaint, and if granted, the opposite party can only claim the same privilege for his own troops. Many modern writers, and the German publicists generally, have pronounced in favor of the views of Vattel. But Heffter, Hautefeuille, Manning, and others, express the opinion, that to grant such passage is a violation of neutral duty, and affords just cause of complaint, if not of war, to the other belligerent. This opinion seems most consonant with the general principles of neutrality.

Halleck, pp. 517-518.

A violation of neutrality is not limited to acts of positive hostility. \* \* \* if it [a neutral state] neglect or refuse to maintain the inviolability of its territory; \* \* \* it violates its duties toward the belligerent who is injured by such act or neglect, and is justly chargeable with hostility. Such conduct furnishes good cause for complaint, and, if persisted in, may become just cause of war.

Halleck, p. 629.

It was formerly thought that the neutral might allow the transit of belligerent troops through his territory \* \* \* if he granted the same to both sides. All now admit that the neutral ought to refuse any of these privileges, and must be the sole judge in the case.

Woolsey, pp. 278, 279.

During the eighteenth century it was an undisputed doctrine that a neutral state might grant a passage through its territory to a belligerent army, and that the concession formed no ground of complaint on the part of the other belligerent. The earlier writers of this century, and Sir R. Phillimore more lately, preserve this view, only so far modifying it as to insist with greater strength that the privilege, if accorded, shall be offered impartially to both belligerents.



But the most recent authors assert a contrary opinion; no direct attempt has been made since 1815 to take advantage of the asserted right; and the permission granted to the allies in that year to cross Switzerland in order to invade France was extorted from the Federal Council under circumstances which would in any case rob the precedent of authority. The same country in 1870 denied a passage to bodies of Alsatians, enlisted for the French army, but travelling without arms or uniforms; and there can be no question that existing opinion would imperatively forbid any renewed laxity of conduct in this respect on the part of neutral countries. Passage for the sole and obvious purpose of attack is clearly forbidden. The grant of permission is an act done by the state with the express object of furthering a warlike end, and is in its nature an interference in the war. It is therefore a non-neutral act; and the only excuse which can be accepted for its performance would be the impossible one that it is equally advantageous to, and desired by, both belligerents at once.

Hall, pp. 623, 624.

A broad distinction is however to be drawn between a grant of passage for a specific purpose in time of war, and a grant of passage made in time of peace to enable a state to reach an outlying portion of its territory, or to enable it to reach its possession with more ease than would otherwise be practicable. In the former case the grant, as has been seen, is essentially un-neutral; in the latter it is essentially colourless when made; and if by the occurrence of a war which happens to touch the outlying territory its effects become injurious to one of the two belligerents, the result is an accidental and possibly an unforeseen one. It is difficult to separate the harmless use of the neutral territory for mere garrison purposes from its use for belligerent purposes; and if the former use has been habitual, and especially if it has been secured by treaty, it probably could not be fairly held that the neutral state is guilty of un-neutral conduct in allowing the passage of troops during war. Its behaviour would however require to be judged by the circumstances of the case; a hard and fast line could scarcely be drawn; and while a rigid limitation of the force permitted to pass to the amount of the ordinary reliefs might be the equivalent of handing over the detached territory to the enemy, the grant of passage to greatly more than the usual numbers might be as definitely un-neutral an act as a grant made solely for the purposes of the war.

Hall, pp. 624, 625.

Thus, a belligerent must not be allowed to march his troops across neutral territory, and if any of them enter it, whether of free choice or in flight from an enemy, they must be interned. That they should use the territory by recovering their strength in it, or by waiting in it for a favourable opportunity of returning to the theatre of war, or to their own country where they might be available for war, would clearly be to bring the neutral soil within the range of military operations. There can be no question about it of equal permission to both belligerents: it must be permitted to neither.

Westlake, vol. 2, p. 233.

Among the uses of its territory a neutral is bound to prevent must be reckoned \* \* \* the passage of the land forces of a belligerent across any portion of its soil.

Lawrence, p. 635.

However, just as in the case of furnishing troops so in the case of passage, it is a moot point whether passage of troops can be granted without thereby violating the duty of impartiality incumbent upon a neutral, in case a neutral is required to grant it in consequence of an existing State-servitude or of a treaty previous to the war. There ought to be no doubt that, since nowadays a qualified neutrality is no longer admissible, the question must be answered in the negative.

Oppenheim, vol. 2, p. 392.

In contradistinction to the practice of the eighteenth century, it is now generally recognized that a violation of the duty of impartiality is involved when a neutral allows a belligerent the passage of troops or the transport of war material over his territory. And it matters not whether a neutral gives such permission to one of the belligerents only, or to both alike.

Oppenheim, vol. 2, p. 391.

\* \* \* when France during the Franco-German war organized an office in Basle for the purpose of sending bodies of Alsatian volunteers through Switzerland to the South of France, Switzerland correctly prohibited this on account of the fact that this *official* organisation of the passage of whole bodies of volunteers through her neutral territory was more or less equal to a passage of troops.

Oppenheim, vol 2, p. 399.

The Government of the neutral State has therefore, once War is declared, to prevent the subjects of both parties from marching through it.

German War Book, pp. 188, 189.

#### Prisoners of war.

The passage or transport of prisoners of war through neutral territory is, on the other hand, not to be allowed, since this would be an open favoring of the belligerent who happened to be in a position to make prisoners of war on a large scale, while his own railways, water highways, and other means of transport remained free for exclusively military purposes.

German War Book, p. 196.

ESTABLISHMENT OR USE ON NEUTRAL TERRITORY OF APPARATUS FOR COMMUNICATION  
WITH BELLIGERENT FORCES—NEUTRAL PROHIBITED FROM ALLOWING.

A neutral Power must not allow [belligerents to—

- (a) Erect on its territory a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;
- (b) Use any installation of this kind established by them before the war on its territory for purely military purposes, and which has not been opened for the service of public messages.]—*Hague Convention V, 1907, Article 5.*

The application of science to warfare has been wonderfully exemplified in the present struggle, chiefly on the Japanese side. The beleaguered garrison of Port Arthur, however, appear to have utilised a marvellous invention in a clever fashion. They have installed a wireless telegraphy apparatus on one of the seaward-looking hills near the town, and from thence have got into touch with a receiving station at Chifu, seventy-seven miles away on the Chinese side of the Gulf of Pechili. They are thus enabled to communicate, in spite of the blockade, with their Government at home and their comrades in the field. The question at once arises whether the neutral power ought not to prevent the receipt of such messages on its territory. The question is a new one, but if we follow the analogy of messages sent by submarine cables there can not be much doubt as to the answer. During the war between America and Spain in 1898 the British authorities refused a request from the United States for permission to land at Hong-Kong a cable which the American authorities proposed to lay from Manila, then in their military occupation, and to use for the purposes of their operations against Spanish territory. The refusal was based upon the ground that to grant such facilities would be a breach of neutrality. The Government of Washington acquiesced in the decision, which was given on the advice of the law officers of the Crown, and was followed by their own Attorney-General in 1899. In the course of their naval operations around Cuba they cut several cables which connected places held by the Spanish forces with neutral territory and though after the war compensation to the extent of the actual damage suffered was voted by Congress to neutral owners, it was granted as a matter of grace and equity and not as of right. The principles underlying these incidents are twofold. The first is that belligerents have a right to prevent messages relating to the war from being sent by their enemies over means of communication which are partly in belligerent and partly in neutral territory, and to this end they may destroy neutral property at the bottom of

the ocean, if there is no other means of stopping the intercourse. The second is that it is a violation of neutrality to allow facilities to one belligerent for communicating by means of neutral territory between his forces in the field and his Government at home, or his military and naval commanders in other parts of the theatre of operations. The application of this last to the case of the wireless receiving station erected by the Russians at the Chinese port of Chifu is obvious. The nature of wireless telegraphy prevents the application of the first. It was not till the end of August that the Chinese authorities awoke to the obligations of neutrality and demolished the station.

Lawrence, *War and Neutrality in the Far East*, pp. 218-220.

Of course a neutral state must not allow a belligerent to have in its territory an establishment of his own for postal or telegraphic service, as Russia was too long allowed by China to have a station near Chifu for maintaining wireless communication between Port Arthur, besieged, and the outer world.

Westlake, vol. 2, p. 254.

Finally we may say that neutral powers are under an obligation *to prevent the use of any part of their territory as an information station by a belligerent*. This was recognized by the Second Hague Conference when in its Convention on State Neutrality in Land Warfare it forbade belligerents to erect on neutral territory "a wireless telegraphy station or any apparatus intended to serve as a means of communication with the belligerent forces on land or sea, or to make use of any installation of this kind established by them before the war on the territory of a neutral power, for purely military purposes and not previously opened for the service of public messages." The Convention on State Neutrality in Sea Warfare applied to neutral ports and waters the prohibition against the erection by a belligerent of wireless telegraphy stations or similar means of communicating with its land or sea forces. Both Conventions declare that a neutral government ought not to allow any of the acts referred to above; but the first left it free "to forbid or restrict the employment on behalf of belligerents of telegraph or telephone cables or of wireless telegraphy apparatus, whether belonging to it or to companies or to private individuals." If it took prohibitive measures or laid down restrictions, it was bound to apply them impartially to both belligerents, and to see that companies and private owners did the same. The effect of all these provisions when taken together is to draw a broad line of distinction between means of sending information owned and controlled by the belligerent himself on neutral territory or in neutral territorial waters, and similar means owned and controlled by the neutral state or by private persons and companies within its jurisdiction. Neutral governments are bound to prevent the erection of the former during the war, and the use of anything of the kind established before the war and not previously opened to the public for the transmission of messages. The latter they are free to deal with as they please on the sole condition that they act impartially as between the belligerents. Two recent cases will illustrate the difference. In 1904, during the siege of Port Arthur, the Russians erected a wireless telegraphy station in the neutral Chinese port of Chefoo, and

thus established communication with the beleaguered fortress. Such an act is now expressly forbidden, and the duty of preventing it laid on the neutral government.

Lawrence, pp. 646, 647.

In contradistinction to the practice of the eighteenth century, the duty of impartiality must nowadays prevent a neutral from permitting belligerents to occupy a neutral fortress or any other part of neutral territory. If a treaty previously entered into stipulates such occupation, it cannot be granted without violation of neutrality. On the contrary, the neutral must even use force to prevent belligerents from occupying any part of his neutral territory.

Oppenheim, vol. 2, p. 394.

The case is different when a belligerent intends to arrange the transmitting of messages through a submarine cable purposely laid over neutral territory or through telegraph and telephone wires purposely erected on neutral territory. This would seem to be an abuse of neutral territory, and the neutral must prevent it. Accordingly, when in 1870, during the Franco-German war, France intended to lay a telegraph cable from Dunkirk to the North of France, the cable to go across the Channel to England and from there back to France, Great Britain refused her consent on account of her neutrality. And again in 1898, during war between Spain and the United States of America, when the latter intended to land at Hong Kong a cable proposed to be laid from Manila, Great Britain refused her consent.

Oppenheim, vol. 2, p. 436.

#### Exception.

The question as to whether such occupation [of neutral territory] on the part of a belligerent would be excusable in case of extreme necessity on account of the neutral's inability to prevent the other belligerent from making use of the neutral territory as a base for his military operations must, I think, be answered in the affirmative, since an extreme case of necessity in the interest of self-preservation must be considered as an excuse.

Oppenheim, vol. 2, pp. 394, 395.

After the destruction of the Spanish fleet at Manila in May, 1898, Admiral Dewey obtained possession of the Philippines and of the cable of the Hongkong and Manila Telegraph Company, which held its concession from Spain on condition that it should not send telegrams when forbidden by the Spanish Government to do so. Acting under this clause, the Spanish Government ordered the company to cease working the cable at Hongkong, and the company was obliged to suspend operations. Under these circumstances, the United States sought from the British Government permission for the landing at Hongkong of a new cable from the Philippines, to be constructed by an American company. Lord Salisbury replied, after consultation with the law officers of the Crown, that it had been decided that the British Government was not at liberty to comply with the request of the United States.

Moore's Digest, vol. vii, p. 940; For Rel. 1898, 976-980.

FORMING CORPS AND OPENING RECRUITING AGENCIES ON NEUTRAL TERRITORY—  
NEUTRAL PROHIBITED FROM ALLOWING.

**A neutral Power must not allow [corps of combatants to be formed nor recruiting agencies to be opened on its territory to assist the belligerents.]—Hague Convention V, 1907, Article 5.**

A neutral State which is desirous of remaining on terms of peace and friendship with the belligerents, and of enjoying the rights of neutrality, must \* \* \* exercise vigilance to prevent its territory from becoming a center of organization or point of departure for hostile expeditions against one or both of the belligerents.

Institute, 1875 pp. 12, 13.

These duties of neutrality extend not only to preventing \* \* \* the enlistment of men in neutral territory, but also to the general sanctity of neutral jurisdiction, by redressing all injuries which one belligerent may commit upon the other within its limits.

Halleck, p. 516.

The practice of neutrals to furnish troops to belligerents, or to allow them to enlist troops on neutral grounds, was formerly common, and allowed. \* \* \* This custom has now a lingering existence: it is forbidden in some countries by law, and is justly regarded as a violation of neutrality.

Woolsey, 279, 280.

The principle that it is incumbent on the neutral sovereign to prohibit the levy of bodies of men within his dominions for the service of a belligerent, which was gradually becoming authoritative during the eighteenth century, is now fully recognized as the foundation of a duty. And its application extends to isolated instances when the circumstances are such as to lead to serious harm being done to a friendly nation.

Hall, p. 622.

In the case of an expedition being organized in and starting from neutral ground, a violation of neutrality may take place without the men of whom it is composed being armed at the moment of leaving. In 1828, a body of troops in the service of Dona Maria, who had been driven out of Portugal, took refuge in England. They remained for some time an organized body under military officers. In the beginning of 1829 they embarked in four vessels, nominally for Brazil, but in fact for Terceira, an island belonging to Portugal. In order to avoid the arrest of the expedition in England, the arms

intended for it had been sent as merchandise from a port other than that from which the men started. The English government considered that as the men were soldiers, although unarmed, they constituted a true expedition, and a small squadron was placed in the neighborhood of Terceira to prevent a landing from being effected. The vessels were stopped within Portuguese waters, and were escorted back to Europe. The British government interfered so thoroughly at the wrong time and in the wrong manner, that in curing a breach of its own neutrality it was drawn into violating the sovereignty of Portugal. But on the main point, as to the character of the expedition, it was no less distinctly right than in its methods it was wrong.

Hall, pp. 630, 631, Hansard, N. S. xxiii, 738-81, and xxiv, 126-214; Bulwer's *Life of Lord Palmerston*, i, 301-2.

\* \* \* no demand is made on neutral states for more than the prevention of such enlistment on their territory as would amount to an unneutral use of it.

Westlake, vol. 2, p. 195.

Creating or recruiting a force to be employed in a war is clearly an operation of that war; and when it is done on neutral soil, either by a belligerent power or by private sympathisers, it is clearly a usurpation of the authority of the neutral state by or on behalf of the belligerent. On both grounds therefore it is a neutral duty of that state not to permit in its territory any thing which forms or is intended to form a part of such creation or recruiting of a force, even though it be only the enlisting of a single recruit. To enlist more, and to drill, arm and organise them, would merely be to take further steps in the same line of conduct.

Westlake, vol. 2, p. 210.

### Exception.

Belligerent subjects who go home to perform their military duties do not fall within the scope of this doctrine. Their obligation has not been formed within the neutral territory which they leave, and it justifies their intention to take part in their country's service. Their consuls assist without offence in making the necessary arrangements for their return.

Westlake, vol. 2, p. 210.

They [neutrals] are also bound to prevent recruitment of men for the forces of either belligerent in their land territory. Agencies for that purpose may not be opened, nor corps of combatants formed. The pronouncement of the Second Hague Conference in this sense registered the triumph of an enlightened opinion which had been gathering force for two hundred years. Vattel in the middle of the eighteenth century surrounded with conditions the old freedom on the part of the neutral to permit belligerent levies in its territory. After him came publicists who condemned such permission in any circumstances. Gradually the practice ceased in its cruder form; but the rulers of small states sometimes covenanted to supply larger powers with a certain number of soldiers. At length in 1859 Switzerland, the last state to maintain contingents in foreign armies, con-

sented under pressure to restrain its citizens from taking military service in foreign countries and punish foreigners who attempted to enroll Swiss contingents. Since then there have been cases when under the influence of popular enthusiasm for a great cause governments have winked at the departure of their subjects openly and in considerable numbers in order to enlist abroad among its defenders. Neglect to stop such proceedings when an armed conflict is in progress is an undoubted breach of neutral duty.

Lawrence, p. 638.

In former centuries neutrals were not required to prevent belligerents from levying troops on their neutral territories, \* \* \*. But at the end of the eighteenth century a movement was started which tended to change this practice. \* \* \* During the nineteenth century the majority of writers maintained that the duty of impartiality must prevent a neutral from allowing the levy of troops. The few writers who differed made it a condition that a neutral, if he allowed such levy at all, must allow it to both belligerents alike. The controversy is now finally settled, for Articles 4 and 5 of Convention V, lay down the rules that corps of combatants may not be formed, nor recruiting offices opened, on the territory of a neutral Power, and that neutral Powers must not allow these acts.

Oppenheim, vol. 2, p. 398.

#### Exception.

Thus in 1870, during the Franco-German war, 1,200 Frenchmen started from New York in two French steamers for the purpose of joining the French army. Although the vessels carried also 96,000 rifles and 11,000,000 cartridges, the United States did not interfere, since the men were not organised in a body, and since, on the other hand, the arms and ammunition were carried in the way of ordinary commerce.

Oppenheim, vol. 2, p. 400.

#### Extension of rule.

An *argumentum e contrario* justifies the conclusion that the responsibility of a neutral is involved in case it does allow men to cross the frontier in a body in order to enlist in the forces of a belligerent.

If the levy and passage of troops, and the forming of corps of combatants, must be prevented by a neutral, he is all the more required to prevent the organisation of a hostile expedition from his territory against either belligerent. Such organisation takes place when a band of men combine under a commander for the purpose of starting from the neutral territory and joining the belligerent forces.

Oppenheim, vol. 2, p. 400.

Somewhat later [Aug. 16, 1793] he [Mr. Jefferson] writes to Mr. Morris, American Minister in Paris, 'that a neutral nation must in all things relating to the war observe an exact impartiality toward the two parties . . . that no succor should be given to either, unless stipulated by treaty, in men, arms, or anything else directly serving for the war: that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to



the nation itself, no foreign power or person can levy men within its territory without its consent; that if the United States have a right to refuse the permission to . . . raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right and to prohibit such \* \* \* enlistments.'

Hall, p. 615; American State Papers, 1, 116.

#### **Laws of the United States.**

Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars and imprisoned not more than three years.

Sec. 5281, Revised Statutes.

Every person who, within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, shall be deemed guilty of high misdemeanor, and shall be fined not more than one thousand dollars, and imprisoned not more than three years.

Sec. 5282, Revised Statutes.

Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.

Sec. 5286, Revised Statutes.

The provisions of this Title [R. S., Secs. 5281-5291] shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people, who is transiently within the United States, and [*enlist*] [enlists] or enters himself on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people, who is transiently within the United States, to enlist or enter himself to serve such foreign prince, state, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people. Nor shall they be construed to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States.

Sec. 5291, Revised Statutes.

Service on commercial vessels.

The Attorney General held in 1796 that if foreign sovereigns "purchase ships in the United States, and load them with provisions for the use of their fleets or armies, those ships are to be considered as commercially employed," and "if they be not *attached* to the naval or military expeditions, as part thereof, in accompanying the fleet, or closely following the army from place to place, for the purpose of furnishing [them with] supplies, there can be no pretext for restraining the American sailors from hiring on board of them, for the purpose of gaining a support in their customary way of occupation."

1 Op. Atty. Gen., 63.

In 1855, Attorney General Cushing said, referring to the provisions of Section 5282, U. S. Revised Statutes: "It is possible, also, that he [the British minister] may have supposed that a solemn contract of hiring in the United States is necessary to constitute the offence. That would be mere delusion. The words of the statute are 'hire or retain'. It is true, our act of Congress does not expressly say, as the British act of Parliament does, 'whether any enlistment money, pay, or reward shall have been given and received or not.' (Act 59 Geo. III, ch. 69, s. 2;) nor was it necessary to insert these words. A party may be retained by verbal promise, or by invitation, for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting, to pay recruiting money in fact, but under another name of board, passage money, expenses, or the like, it would be idle to pass acts of Congress for the punishment of this or any other offence."

27 Op. Atty. Gen., 377.

In 1837 an insurrection occurred in Canada, under the leadership of Wm. Lyon McKenzie, a printer, and certain other persons. The movement was attended with commotions at various places in the United States along the Canadian frontier. December 7, 1838, Mr. Forsyth, who was then Secretary of State, addressed a letter to the district attorneys of the United States for Vermont, Michigan, and the northern district of New York, stating that it was "the fixed determination of the President faithfully to discharge, so far as his power extends, all the obligations of this Government, and that obligation especially which requires that we shall abstain, under every temptation, from intermeddling with the domestic disputes of other nations." On the same day Mr. Forsyth wrote to the governors of New York, Michigan, and Vermont, requesting their "prompt interference to arrest the parties concerned, if any preparations are made of a hostile nature against any foreign power in amity with the United States." Meanwhile the Canadian insurgents were defeated, and some of them sought refuge in the United States. Among the refugees were two of the leaders, McKenzie and Dr. Rolfe, who held public meetings in Buffalo and solicited recruits, of whom they succeeded in obtaining a considerable number, as well as a quantity of arms and ammunition.

The collectors of customs on the Canadian frontier were instructed to lend their aid in enforcing the neutrality laws, and the

marshal of the United States for the northern district of New York was directed to proceed to Buffalo for the purpose of suppressing the violations of neutrality in that quarter. On the 28th of December, 1837, he reported that on his arrival at Buffalo he found 200 or 300 men, mostly from the American side of the Niagara River, encamped on Navy Island, in Upper Canada, armed and under the command of Rensselaer Van Rensselaer, of Albany, who had assumed the title of "general." The encampment had received accessions till it numbered about 1,000 men, well armed. This expedition had been organized at Buffalo after McKenzie's arrival. Warrants had been issued for the arrest of the men, but could not be served.

On the 29th of December occurred the destruction of the steamer *Caroline*, at Schlosser, in the State of New York, by a British force from Canada. December 30 the collector of customs at Buffalo wrote: "Our city is in great alarm. The whole frontier is in motion, and God knows where it will end. An express has been sent to Governor Marcy to call out the militia." The collector feared that the laws could not be enforced without great loss of life. The revenue cutter *Erie* was placed at his disposal to aid in enforcing the laws; and he was ordered to seize any vessels or boats which might be engaged in carrying arms, ammunition, or military supplies to forces arrayed against the Government on the Canadian side of the line.

January 5, 1838, President Van Buren sent a message to Congress, saying that the existing laws, as experience on the southern border and the events daily occurring on the northern frontier had shown, were insufficient to guard against the hostile invasion from the United States of the territory of neighboring and friendly nations and recommending that the Executive be clothed with "full power to prevent injuries being inflicted upon neighboring nations, by the unauthorized and unlawful acts of citizens of the United States, or of other persons who may be within our jurisdiction, and subject to our control." General Scott was sent to the frontier, with letters to the governors of New York and Vermont, requesting them to call out the militia. Congress passed the act of March 10, 1838.

Moore's Digest, vol. vii, pp. 919, 920.

The activity of the Fenian Brotherhood in raising movements and stirring up insurrection against the British Government in Ireland and in Canada formed the subject of correspondence between the governments of the United States and Great Britain in 1865 and subsequent years, some of the persons implicated in these affairs having proceeded from the United States. During the sessions of the joint high commission at Washington, in 1871, the British commissioners brought forward claims of the people of Canada for injuries suffered from Fenian expeditions carried out from the United States. The American commissioners declined to entertain the claims, as they did not come within the class of subjects indicated by Sir Edward Thornton in his note of January 26, 1871, as being referred to the consideration of the commission. The British commissioners did not urge the settlement of the claims by the commission, and stated that they had less difficulty in taking this course, as a portion of the claims "were of a constructive and inferential character." In the diplomatic correspondence, the United States maintained that it

had fully performed its full duties as a neutral in repressing any ascertainable attempts to violate the neutrality laws, and that neither the character of the agitation nor the condition of international relations rendered it wise for the United States to denounce the proceedings of the agitators, as long as they confined themselves "within those limits of moral agitation which are recognized as legitimate equally by the laws of the United States and by those of Great Britain."

Moore's Digest, vol. vii, pp. 929, 930; Mr. Seward, Secretary of State, to Mr. Burnley, British chargé, March 20, 1865, Dip. Cor. 1865, II, 103; Mr. Seward, Secretary of State, to Mr. Adams, minister to England, No. 1709 (confidential), March 10, 1866, Dip. Cor. 1866, I, 77.

June 26, 1855, J. W. Fabens, in a letter to Mr. Marcy, Secretary of State, solicited the interference of the Government of the United States to further what was called the Kinney expedition to Nicaragua, and to protect the lives and property of those concerned in it after they should have arrived in that country. The professed object of the expedition was that of peaceful colonization, but the Government of Nicaragua had issued a proclamation denouncing it as a filibustering or "piratical" enterprise for the subversion of the national independence, and a grand jury at New York had, after investigation of the case, presented both Kinney and Fabens for trial on a charge of fitting out a hostile expedition. When Fabens applied to the Department of State for assistance, this charge had not been tried, owing to the fact that Kinney had evaded trial by leaving the United States. Under the circumstances Mr. Marcy declined to act upon Fabens's assurance that the expedition was a lawful one. "I am aware," said he, "that civil discord now prevails in the Republic of Nicaragua, and it is natural to conclude that what one party oppose another may favor. While this Government believes it prudent to abstain from interfering as far as practicable with these internal divisions, yet it can not decline, in certain emergencies, to decide who possess the political power of the state. Our minister in Nicaragua has regarded the authorities which issued the proclamation against your expedition to be in possession of the executive power of Nicaragua; he has been received by and [has] treated with them as the Government of that country, and has lately negotiated a treaty with them. This fact has an important bearing on the subjects presented in your letter of the 26th instant, and sustains the positions I have taken in this reply to it."

Moore's Digest, vol. vii, pp. 924, 925; Mr. Marcy, Secretary of State to Mr. Fabens, June 29, 1855.

September 18, 1857, Mr. Cass, as Secretary of State, issued a circular to United States attorneys, marshals, and collectors, calling upon them to enforce the neutrality laws of the United States against lawless persons who were believed to be engaged within the limits of the United States in setting on foot and preparing the means for military expeditions to be carried on against the territories of Mexico, Nicaragua, and Costa Rica, a copy of which circular was, on October 2, 1857, sent by the Secretary of the Navy to various officers of the Navy. Among these was Commander Frederick Chatard, commanding the U. S. S. *Saratoga*, at Colon. Commander Chatard was present with his ship at Punta Arenas, Nicaragua, when on November 25, 1857,

the steamer *Fashion* arrived there from Mobile, having on board a large number of "passengers." These passengers proved to be William Walker and 150 followers, all of whom were permitted to land without interference. Commander Chatard was afterwards suspended from command on account of his nonaction on this occasion. On the 6th of December, Commodore Paulding arrived at Punta Arenas, and on the 8th of the month demanded of Walker the surrender of his arms and the embarkation of his entire band. The men were placed on board the *Saratoga* and sent to New York, but, before the departure of that ship Walker was taken by Commodore Paulding on board his flagship, the *Wabash*, which landed Walker at Colon, where he took a steamer to New York, under engagement to present himself on his arrival to the United States marshal. On March 19, 1858, Commodore Paulding landed the arms at the New York navy-yard, the Navy Department having ordered that they should be delivered to the owner or owners who should show a sufficient title, the United States having no claim upon them. President Buchanan took the view that Commodore Paulding in capturing Walker and his command, "after they had landed on the soil of Nicaragua," although it was done with the assent of the authorities of the country, had committed a grave error. This error, said President Buchanan, consisted in "landing his sailors and marines in Nicaragua, whether with or without her consent, for the purpose of making war upon any military force whatever which he might find in the country, no matter from whence they came." Under these circumstances, when Marshal Rynders, on December 29, 1857, presented himself at the Department of State with Walker in custody, Mr. Cass informed him that the executive department of the Government did not recognize Walker as a prisoner and had no directions to give concerning him, and that it was only through the action of the judiciary that he could be lawfully held in custody to answer any charges that might be brought against him.

Moore's Digest, vol. vii, pp. 927, 928; Special Message of President Buchanan to the Senate, January 7, 1858, Senate Ex. Doc. 13, 35 Cong. 1 sess.

October 19, 1864, a party of twenty or more persons, acting in the interest of the Confederate States, who had been commorant in Canada, raided the town of St. Albans, Vt., fired shots at various persons, of whom one was killed; set fire to several buildings, and appropriated the funds of the banks, together with horses and other property. They then returned to Canada, where some of them were arrested. The incident formed the subject of an extended diplomatic correspondence. Claims against Great Britain in behalf of the citizens of the United States who were injured or suffered losses were presented to the mixed commission under Art. XIII. of the treaty of May 8, 1871. These claims were unanimously disallowed, on the ground that the enterprise was conducted with such secrecy that no care or diligence which one nation might reasonably require of another in such cases would have been sufficient to discover it. It appeared that the raiders came over to St. Albans, not in organized form, but apparently as peaceable travelers by railroad and not in company, and stopped at the village hotels.

Moore's Digest, vol. vii, pp. 928, 929; Moore's Int. Arbitrations, IV, 4042-4054.

In the case of the Riel rebellion in Manitoba, in 1885, in which it was reported that Indians and whites from the United States with cannon and munitions were taking part with the Winnipeg insurgents, prompt measures were taken by the United States to prevent the departure of any hostile expedition or the shipment of arms or ammunition across the border.

Moore's Digest, vol. vii, p. 932; Mr. Bayard, Secretary of State, to Mr. Garland, Attorney General, March 25, 1885, 154 MS. Dom. Let. 609; Mr. Bayard, Secretary of State, to Mr. Endicott, Secretary of War, March 28, 1885, id., 618; Mr. Bayard, Secretary of State, to Mr. Manning, Secretary of Treasury, March 28, 1885, id., 615; Mr. Bayard, Secretary of State, to the governor of Minnesota, tel., March 28, 1885, id., 611; Mr. Bayard, Secretary of State, to Mr. Endicott, Secretary of War, April 17, 1885, 155 MS. Dom. Let. 132; same to same, April 10, 1885, id., 61.

In December, 1892, complaints were made by the Mexican legation at Washington of the reappearance on the Texas border of the Garza bandits and of raids by them into Mexico. It was alleged that two Mexican officers and four privates were burned by them in a raid on the Mexican side of the river opposite San Ignacio, in which fire was set to the Mexican barracks. Complaints were also made by the Mexican Government of raids at other places. The Mexican Government alleged that the raids would not have occurred but for the lack of United States troops in Texas to prevent violations of the neutrality laws and for the want of care shown in the matter by the local authorities of that State. The United States, on the other hand, maintained that the conditions rendered it difficult to police the frontier, which was a long line, thinly populated, where the nature of the country furnished great facilities for concealment and escape, with a river so easily crossed at any point; that the persons making the raids were organized secretly in Texas and did not appear as organized bodies till they had crossed the river, too late for attack by United States troops; that likewise, on returning from Mexico, they dispersed and scattered over the country, either individually or in small parties, making pursuit difficult, if not impossible, as they never presented an object of attack by troops on American soil; that renewed orders had, however, been given to the American forces for the exercise of the greatest vigilance to prevent any violation of the neutrality laws. Correspondence was also held with the authorities of Texas, with a view to suppress the raiders. It appears that at the close of December, 1892, the total number of troops in active service on the Mexican side of the line was 2,727. The United States forces in the vicinity of the Rio Grande numbered at the same time about 1,800 men.

Moore's Digest, vol. vii, pp. 932, 933, For. Rel. 1893, 424-435.

On June 20, 1898, the Secretary of State instructed the American Minister to Venezuela as follows: "I have to acknowledge the receipt of your No. 145 of the 7th instant, in which you report your action in relation to a public announcement in a newspaper of Ciudad Bolívar that the Spanish vice-consul in that city had, by the authority of the Spanish legation at Caracas opened books 'for the enrollment of volunteers and the reception of subscriptions' in aid of Spain in her war with the United States. You state that both the president and the minister of foreign affairs of Venezuela agreed 'that the Spanish

legation had gone too far, and that a stop should immediately be put to its efforts to raise men and money on Venezuelan soil with which to oppose the United States,' and it appears that as a result of your representations the ministry of foreign affairs issued on the 1st of June a decree in which attention is called to various provisions of the penal code of Venezuela by which it is forbidden to anyone, without authority of the national government, to make levies or to arm and equip 'Venezuelans or foreigners on Venezuelan soil destined for the service of another nation, or to arrogate to himself illegal functions, and, without authority, to open an office for making subscriptions or enlistments.' "

For. Rel. 1898, 1136.

**Henfield's Case, U. S. Circuit Court, Penn. District.**

One Henfield, a citizen of Massachusetts, while in Charleston, S. C., went on board the French privateer *Citizen Genet*, upon being promised by the captain that he would be made prize-master of the first prize captured. Later the ship *William* having been captured, Henfield was put on board as prize-master and arrived with her in Philadelphia where he was indicted for illegally enlisting in a French privateer.

Chief Justice Jay in his charge to the Grand Jury, stated that in consequence of the proclamation of neutrality by the President and the treaties of peace with the powers in question, the United States was bound by the law of nations to maintain a strictly neutral attitude toward both belligerents. Any inhabitant of the United States who aided or abetted hostilities against those powers offended against the laws of the United States.

Judge Wilson in his charge to the trial jury stated:

That by the law of nations, the defendant, as a citizen of the United States, was bound to keep the peace with all nations with whom the United States was at peace.

The accused was acquitted.

1793, Wharton St. Tr., p. 49.

One Isaac Williams was convicted in a United States court in Connecticut, in 1797, and fined and imprisoned for a violation of the neutrality laws in accepting in the United States a French commission and under the authority thereof committing acts of hostility against Great Britain.

*Murray v. Schooner Charming Betsey*, 2 Cranch, 64, 82, note summarizing the case as reported in the National Magazine, No. 3, p. 254; Moore's Digest, vol. vii. p. 879.

**Power of court to exact bond, as preventive measure.**

*United States v. Quitman*, 27 Fed. Cases, No. 16111.—This was a case in which persons accused of effecting an organization in violation of the neutrality laws, refused to answer questions put to them by a grand jury.

The court held that on the ground of such refusal, these persons should be required to give bonds to observe the neutrality laws.

The court said: "The President of the United States has admonished the country that there is danger of a violation of these impor-

tant statutes, and the grand jury, after a patient investigation, certify that this admonition has a legitimate foundation. Public rumor has attached suspicion to the name of the defendant, according to the certificate. I will say with the Chief Justice of England, already quoted, 'We should be poor guardians of the public peace, if we could not interfere until an actual outrage had taken place, and, perhaps, fatal consequences ensued.'"

*30 Fed. Cases, No. 18265.*—In a charge to the grand jury considering indictments under section 5281, United States Revised Statutes, Judge McLean stated that "some overt act, under the commission, must be done; such as raising men for the enterprise, collecting provisions, munitions of war, or any other act which shows an exercise of the authority which the commission is supposed to confer."

*30 Fed. Cases, No. 18267.*—The provisions of section 5286, United States Revised Statutes were thus analyzed by Judge McLean in a charge to the grand jury in 1851: "To 'begin' the military expedition \* \* \* is to do the first act which may lead to the enterprise. The offense is consummated by any overt act which shall be a commencement of the expedition, though it should not be prosecuted. \* \* \* To set it on foot may imply some progress beyond that of beginning it. Any combination of individuals to carry on the expedition is 'setting it on foot,' and the contribution of money or anything else which shall induce such combination, may be a beginning of the enterprise. 'To provide the means for such an enterprise,' is within the statute. To constitute this offense, the individual need not engage personally in the expedition. If he furnish the munitions of war, provisions, transportation, clothing, or any other necessities, to men engaged in the expedition, he is guilty."

In this case it was held that the enlistment of men for the expedition comes within the statute, which, in *U. S. v. O'Sullivan*, 27 Fed. Cases, No. 15975, was held to cover the contribution of money, clothing, provisions, arms, etc., and in *U. S. v. Murphy*, 84 Fed. Rep., 609, to cover the furnishing of transportation for the troops collected for the expedition.

*United States v. Louis Kazinski, 2 Sprague, 7.*—In this case, of a prosecution for violation of the statute prohibiting the hiring or retaining of another person to enlist or enter himself or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign state, it appeared that certain American citizens were induced to go on board a vessel in New York with the promise of obtaining work in Halifax, N. S. It did not appear that these persons had any intention of enlisting, although that was presumably the purpose of sending them to Halifax.

Held that to constitute the offence charged requires the consent of the persons to be enlisted, and since in this case the persons were only deceived into going on board the ship, without obtaining such consent, no offence was committed under the statute.

What constitutes an "expedition."

*U. S. v. Ybanez, 53 Fed. Rep., 536.*—In this case the court held that "this statute [5286, R. S.] does not require any particular number of men to band together to constitute the expedition or ener-



prise one of a military character. There may be divisions, brigades, and regiments, or there may be companies or squads of men. Mere numbers do not conclusively fix and stamp the character of the expedition as military or otherwise. A few men may be deluded with the belief of their ability to overturn an existing government or empire, and, laboring under such delusion, they may enter upon the enterprise."

It was further held that the character of an expedition may be determined by the designation of officers or leaders, the organization of the men and the purchase of military stores, and that the expedition need not actually set out, as the cruise is completed by the mere organization, or other step in the inception thereof.

*U. S. v. Wiborg*, 73 Fed. Rep., 159.—In this case the court held that "it is not necessary that the men shall be drilled, put in uniforms, or prepared for efficient service; nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery or cavalry; it is sufficient that they shall have combined and organized here to go there and make war on the foreign government, and have provided themselves with the means of doing so."

The court stated the facts of the case, as conclusively establishing the existence of a military expedition, to be as follows:

"This body of men went on board a tug loaded with arms; were taken by it thirty or forty miles and out to sea; met a steamer outside the three-mile limit by prior arrangement; boarded her with the arms, opened the boxes and distributed the arms among themselves; drilled to some extent; were apparently officered; and then, as preconcerted, disembarked to effect an armed landing on the coast of Cuba. The men and the arms and ammunition came together; the arms and ammunition were under the control of the men; the elements of the expedition were not only 'capable of proximate combination into an organized whole,' but were combined or in process of combination; there was concert of action; they had their own pilot to the common destination; they landed themselves and their munitions of war together by their own efforts."

See *Wiborg v. United States*, 163 U. S. 632; *United States v. Hughes*, 75 Fed. Rep., 267; *Hart v. United States*, 84 Fed. Rep., 799.

#### Organization necessary to constitute an "expedition."

*United States v. Hart*, 74 Fed. Rep. 274.—In this case the court held: "I only repeat that while it is not necessary in my judgment that all the elements of a military expedition—soldiers, officers, a military organization, arms and equipments—should exist or be supplied at the time when the vessel sails, it is necessary that there should be a combination for these purposes, that these should have been within the understanding and intent of the parties and that some of these things should be consummated here. The most essential thing would seem to be a combination for some kind of military organization, some enrolment, some enlistment, or some agreement which bound the men to act together as a body for military service."

*United States v. O'Brien*, 75 Fed. Rep., 900.—The steamer *Bermuda* left the United States with a cargo of arms and munitions of war. She also had on board a number of passengers who were intending to enlist in the army of the Cuban insurgents. The captain,

O'Brien, and the mate and others were indicted for taking part in the preparation and transportation of a hostile military expedition against the King of Spain in Cuba. *The court charged*: "If the jury find that there was a combination or concert of action or organization among these passengers to stand together for the purpose of effecting their landing in Cuba and reaching the Cuban army, then it was a military expedition; and if the captain, mate or owner were aware of such a combination when the men went on board or at the time they sailed, they must convict them.

"It was not a crime for individuals to leave the United States with the intention of enlisting in foreign military service, or for persons to transport such people, or for persons to transport arms and ammunition even in the same ship, when it was purely a commercial enterprise, and there was no connection between the men and the arms except that of porters of the same.

"The mere fact that mystery or secrecy is used, such as the taking of a false oath by the master in clearance papers is not conclusive evidence, against the legality of the enterprise; because these means may be resorted to to prevent a foreign power from seizing the cargo as contraband on the high seas."

*United States v. Murphy*, 84 *Fed. Rep.*, 609.—In this case the court said: "Nor is it necessary that all of the persons composing the military enterprise should be brought in personal contact with each other within the limits of the United States; nor that they should all leave those limits at the same point. It is sufficient that by previous arrangement or agreement, whether by conversation, correspondence or otherwise, they become combined and organized for the purposes mentioned, and that by concerted action, though proceeding from different portions of this country, they meet at a designated point either on the high seas or within the limits of the United States."

RESPONSIBILITY OF NEUTRAL LIMITED TO ITS OWN TERRITORY.

**A neutral Power is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.**—*Hague Convention V, 1907, Article 5.*

As territorial sovereignty brings with it duties, so it supplies the measure of neutral responsibility. A state cannot be asked to take cognizance of what occurs outside its own borders. In another country it obviously cannot act. On the sea it is not required to act, both because its jurisdiction, being confined to its own ships, is inadequate, and because it would be beyond the power of any state to supervise the actions of its subjects, or of persons who may have made improper use of its territory, on all the oceans of the world. A state therefore washes its hands of responsibility at the edge of its territorial waters. Of whatever hostile conduct its subjects, or other persons issuing from its shores, may be guilty, the remedy of a belligerent is upon them personally, and not upon the nation to which they belong or the territory of which they may have used.

Hall, pp. 78, 79.

It has been proposed to stretch the liability of a neutral sovereign so as to make him responsible for the ultimate effect of two independent acts done within his jurisdiction, each in itself innocent, but intended by the persons doing them to form part of a combination having for its object the fitting out of a warlike expedition at some point outside the neutral state. The argument upon which this proposal rests has been shortly stated as follows:

‘The intent covers all cases, and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory—whether acts of building, fitting, arming, or of procuring materials for those acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise.’

In accordance with this view, it was contended on the part of the United States before the Tribunal of Arbitration at Geneva that the Alabama and Georgia, two vessels in the Confederate service, were in effect ‘armed within British jurisdiction.’ The Alabama left Liverpool wholly unarmed on July 29, 1862, and received her guns and ammunition at Terceira, partly from a vessel which cleared a fortnight later from Liverpool for Nassau in the Bahamas, and partly from another vessel which started from London with a clearance for Demerara. In like manner the Georgia cleared from Glasgow for China, and received her armament off the French coast from a vessel which sailed from New Haven in Sussex.

The intent of acts, innocent separately, but rendered by this theory culpable when combined, can only by their nature be proved when the persons guilty of them are no longer within neutral jurisdiction. They cannot therefore be prevented by the state which is saddled with responsibility for them; and this responsibility must mean either that the neutral state will be held answerable in its own body for injury suffered by the belligerent, in which case it will make amends for acts over which it has had no control, or else that it is bound to exact reparation from the offending belligerent, at the inevitable risk of war.

If this doctrine were a legal consequence of the accepted principles of international law it might be a question whether it would not be wise to refuse operation to it on the ground of undue oppressiveness to the neutral. But no such difficulty arises; for, as responsibility is the correlative of power, if a nation is to be responsible for innocent acts which become noxious by combination in a place outside its boundaries, it must be enabled to follow their authors to the place where the character of the acts becomes evident, and to exercise the functions of sovereignty there. But even on the high seas it is not permissible for a non-belligerent state to assume control over persons other than pirates or persons on board its own ships and within foreign territory it has no power of action whatever.

The true theory is that the neutral sovereign has only to do with such overt acts as are performed within his own territory, and to them he can only apply the test of their immediate quality. If these are such in themselves as to violate neutrality or to raise a violent presumption of fraud, he steps in to prevent their consequences; but if they are presumably innocent, he is not justified in interfering with them. If a vessel in other respects perfectly ready for immediate warfare is about to sail with a crew insufficient for fighting purposes, the neutral sovereign may reasonably believe that it is intended secretly to fill up the complement just outside his waters. Any such completion involves a fraudulent use of his territory, and an expectation that it is intended gives him the right of taking precautions to prevent it. But no fraudulent use takes place when a belligerent in effect says: I will not compromise your neutrality, I will make a voyage of a hundred miles in a helpless state, I will take my chance of meeting my enemy during that time, and I will organize my expedition when I am so far off that the use of your territory is no longer the condition of its being.

Hall, pp. 631-634.

PERSONS LEAVING NEUTRAL COUNTRY SEPARATELY TO ENLIST WITH BELLIGERENT—  
NEUTRAL NOT RESPONSIBLE.

**The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.**—*Hague Convention V, 1907, Article 6.*

Contra.

If either of the parties shall be at war with any nation whatever, the other shall not take a commission from the enemy, nor fight under their colors.

Treaty of Peace and Friendship, concluded between the United States and Morocco, September 16, 1836, Article II.

International law does not require of the neutral sovereign that he should keep the citizen or subject within the same strict lines of neutrality which he is bound to draw for himself. The private person, if the laws of his own state or some special treaty do not forbid, \* \* \* can enter into its [a belligerent state] service as a soldier, without involving the government of his country in guilt. \* \* \* The practice of individuals belonging to a neutral nation serving in foreign wars was formerly widely diffused and admitted throughout Europe, and it is not of easy prevention, if prohibited; for at the worst the individual may renounce his country, putting himself also beyond its protection. It is only when a great pressure into the armies of one of the belligerents is on foot that the neutral can be called on to interfere.

Woolsey, p. 280.

Starting from the theoretical side, we have arrived at this, that the duties of neutrals flow from the principle that they ought to avoid acts of war as long as they decline to enter on a state of war; that the hopelessness of a complete agreement on theoretical grounds between belligerents and neutrals as to what are acts of war, makes positive rules imperatively necessary; that to a large extent such rules exist; and that some of them, for the sake of peace, throw exclusively on individuals the duty which they prescribe and the responsibility for failure in those duties, recognising in belligerents, to the extent permitted by the rules in question, their right of acting directly against all who interfere with their wars without state authority at their back.

Westlake, vol. 2, pp. 197, 198.

The position of an individual who leaves his country in order to enter belligerent service is similar, the other belligerent being entitled to treat him as an unprotected enemy, while no demand is made on neutral states for more than prevention of such enlistments on their territory as would amount to an unneutral use of it.

Westlake, vol. 2., p. 195.

But that a subject, not enlisted, should go abroad with the intention of entering belligerent service would not of itself involve his state, in the territory of which nothing illegitimate would have been done, although an agency, opened or carried on within the territory for encouraging such departures in search of service, would only be a colourable avoidance of enlistment on the soil, and its case could not properly be distinguished from that of actual enlistment.

Westlake, vol. 2., p. 210.

But a state cannot be expected to prevent the secret departure of a few individuals [to enlist in the forces of a belligerent].

Lawrence, p. 639.

#### **Qualification as to military and naval officers.**

Although several States, as Great Britain and the United States of America, by their Municipal Law prohibit their subjects from enlisting in the military or naval service of belligerents, the duty of impartiality incumbent upon neutrals does not at present include any necessity for such prohibition, provided the individuals concerned cross the frontier singly and not in a body. But a neutral must recall his military and naval officers who may have been serving in the army or navy of either belligerent before the outbreak of war. A neutral must, further, retain military and naval officers who want to resign their commissions for the obvious purpose of enlisting in the service of either belligerent.

Oppenheim, vol. 2, pp. 390-391.

#### **Extension of rule.**

A neutral is not obliged by his duty of impartiality to interdict passage through his territory to men either singly or in numbers who intend to enlist. Thus in 1870 Switzerland did not object to Frenchmen traveling through Geneva for the purpose of reaching French corps or to Germans traveling through Basle for the purpose of reaching German corps, under the condition, however, that these men traveled without arms and uniform.

Oppenheim, vol. 2. p. 399.

#### **Contra—British laws.**

4. If any person, without the licence of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with Her Majesty, and in this act referred to as a friendly State, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any

commission or engagement in the military or naval service of any such foreign State as aforesaid—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

5. If any person, without the licence of Her Majesty, being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

6. If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

7. If the master or owner of any ship, without the licence of Her Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within Her Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons; that is to say:

(1.) Any person who, being a British subject within or without the dominions of Her Majesty, has, without the licence of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign State at war with any friendly State:

(2.) Any person, being a British subject, who, without the licence of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State:

(3.) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State; such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue; that is to say:

(1.) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and the imprisonment, if awarded, may be either with or without hard labour; and

(2.) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace: and

(3.) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

British Foreign Enlistment Act, 1870, secs. 4-7.

Article 6, Hague Convention V, 1907, is substantially identical with section 233, Austro-Hungarian Manual, 1913.

In a note to the Spanish minister, of May 8, 1856, the United States Secretary of State said: "What have been called expeditions organized within our limits for foreign service have been only the departure of unassociated individuals. Such a departure, though several may go at the same time, constitutes no infringement of our neutrality laws, no violation of neutral obligations, and furnishes no ground for the arraignment of this Government by any foreign power."

Moore's Digest, vol. vii, p. 927.

*The "Santissima Trinidad," v. Wheat*, 283.—In this case the court said that an American citizen might enter either the land or naval service of a foreign government without compromising the neutrality of the United States.

*United States v. Hart*, 74 Fed. Rep., 724.—In this case the court said: "As this is lawful for one man [to leave the United States to enlist abroad], so it is lawful for ten men or for twenty or a hundred men. It is a necessary incident to this lawful right, that men may go abroad for this purpose in any way they see fit; either as passengers by a regular line steamer, or by chartering a steamer, or in any other manner they choose, either separately or associated; so long as they do not go as a military expedition, nor set on foot a military enterprise, which Sec. 5286 prohibits."

The court further said: "If, however, the expedition or enterprise was designed only to transport munitions of war as merchandise to Cuba, though for the use of the insurgent army, and at the same time to transport a body of men as individuals to Cuba, who wished to enlist there, and that was all, then it was not a military expedition or enterprise under this statute; it would not be so unless the men had first combined or agreed to act together as a military force, or contemplated the exercise of military force in order to reach the insurgent army."

*United States v. O'Brien*, 75 Fed. Rep., 900.—In this case it was held that individual citizens leaving the country with intent to enlist in a foreign army when they have arrived abroad may even char-



ter a steamer for the purpose of facilitating their passage, provided they are not so organized as to constitute an "armed expedition" within the meaning of section 5286, Revised Statutes.

*United States v. Nunez*, 82 Fed. Rep., 599.—In this case it was held that since it is not an offense against the neutrality laws of the United States for individual citizens to leave the country with intent to enlist in a foreign army when they have arrived abroad, they may, as a necessary condition of their departure, go in company with one another, provided they are not so organized as to constitute an "armed expedition" within the terms of section 5286, Revised Statutes.

EXPORT OR TRANSPORT OF WAR SUPPLIES TO BELLIGERENT—NEUTRAL NOT CALLED UPON TO PREVENT.

**A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.—*Hague Convention V, 1907, Article 7.***

It was contended, on the part of the French nation, in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry, themselves, to the belligerent powers, contraband articles subject to the right of seizure, *in transitu*. This right has since been explicitly declared by the judicial authorities of this country.

Kent, vol. 1, p. 148.

But while the law of nations holds the government of the neutral state responsible for any act of positive hostility committed by its officers, or, in most cases, by its citizens and subjects, it is not in general held responsible for ordinary violations of neutral duty, (not in themselves of positive hostility,) by such citizens or subjects. The law in such cases imposes the duty upon the individual, and if it be violated, the penalty is imposed and enforced upon the individual, by the capture and confiscation of his property. Thus, the neutral state is not bound to restrain its subjects from engaging in contraband trade, \* \* \* Nor do the courts of a neutral country, as a general rule, enforce penalties for violations of neutral duty. \* \* \* Such courts do not enforce penalties for carrying contraband of war, \* \* \* All such cases are left to be adjusted by the prize tribunals of the belligerents.

Halleck, p. 630.

International law does not require of the neutral sovereign that he should keep the citizen or subject within the same strict lines of neutrality which he is bound to draw for himself. The private person, if the laws of his own state or some special treaty do not forbid, can lend money to the enemy of a state at peace with his own country for purposes of war [can sell it arms, ammunition, or any article of war], \* \* \* without involving the government of his country in guilt. The English courts, however, and our own deny that any right of action can arise out of such a loan, on the ground that it is contrary to the law of nations. (Phillimore, iii., Sec. 151; case of *Kennett v. Chambers*, 14 Howard's U. S. Rep., 38.)

Woolsey, p. 280.

As to the question of dealing in contraband, confusion has resulted from the failure to distinguish the different lights in which contraband traffic is to be viewed. In works on international law we often find the statement that the sale of contraband is unlawful, while we also find the statement that it is lawful. Both statements are true in the sense in which they are intended to be understood, but they refer to two different things.

The fundamental principles are simply these: From the point of view of *neutrality* the question of *unlawfulness* is presented in two aspects, (1) that of international law, and (2) that of municipal law. Offenses under (1), i. e., acts unlawful by international law, are divided into two classes, (a) acts which the state is bound to prevent, and (b) acts which the state is not bound to prevent, and which therefore are not usually offenses against municipal law. The dealing in contraband belongs under (1) (b), for it is (1) unlawful by international law, as is shown by the fact that the noxious articles may be seized on the high seas and *confiscated*; but (b) it is not an act which it is the duty of the neutral state to prevent, and therefore is not usually prohibited by municipal law.

Why is the neutral state not bound to prevent it? Simply because, from obvious considerations of convenience, it has been deemed just to confine within reasonable bounds the duty of the neutral state to interfere with the commerce of its citizens, even for the purpose of repressing unneutral acts. The principal interest to be subserved being that of the belligerents, it is left to them, in respect of many acts in their nature unneutral, to adopt measures of self-protection; and neutral states are deemed to have discharged their full duty when they submit to the belligerent enforcement of such measures against their citizens and their commerce.

Moore's Digest, vol. vii, p. 972.

\* \* \* states not only do not punish blockade-running and the traffic in contraband but even enforce judicially contracts made for those purposes.

Westlake, vol. 2, p. 195.

We, therefore, in accordance with the general opinion, hold that a neutral state is not bound by actual international law to prohibit the export of contraband \* \* \*

Westlake, vol. 2, p. 196.

The European states which have colonial possessions know well that relations of enmity and neutrality exist between them and natives having nothing which can be treated as state life, with whom therefore they can only deal as with men to be treated with justice. If states please to arrange the duties of neutrality on a footing which allows them to leave their subjects in certain cases face to face with foreign powers, there is merely another instance of a similar kind. Impossibility in fact there is none, and to assert an impossibility in theory, to say that an individual so left to himself is incapable of interfering in a war, and that his acts can receive no legal qualification unless they are first carried up to his state and then down again to himself, is purely arbitrary. It remains true that international law is the law of states, but there is no solid reason why states should

not agree by such law that the responsibility for certain acts and their repression shall rest with the individual and the state directly concerned. The only real question is whether they have done so, and of this the proof is similar in its character and equal in its cogency to that of many other international rules.

Westlake, vol. 2, p. 197.

We have seen that the export or carriage of contraband of war, like blockade-running, is in general left by international law to be repressed by the belligerent whom it damages. A state which attempted to prevent it by its own law would not only be gratuitously outrunning its neutral duty, but would be assuming a task very difficult to perform without so strict a supervision of its subjects' business as in most countries would be felt to be intolerably onerous. In return it would scarcely fail to meet from belligerents with complaints of imperfect and partial fulfilment of the duty undertaken, which it would be more difficult to answer than it would have been to maintain the true line of neutral conduct.

Westlake, vol. 2, p. 299.

#### **Exception—Direct supply of war-vessels.**

When however the export of contraband amounts in its peculiar circumstances to participation in a specific operation of war, it no longer falls within the conditions under which a state can tolerate it without a disregard of the neutrality due from its territory. We have seen this in the case of despatching ships in belligerent service or control, and a similar case is presented by the export of coal to a war fleet at sea. That would amount to a participation in the operations which the supply of coal rendered possible, and Great Britain accordingly prohibited the export of coal to the French fleet in the North Sea during the war of 1870, but refused to prohibit its export to France, though strongly pressed to do so by Germany, which power did not place the demand so much on general grounds as on the equally inadmissible claim to a benevolent neutrality on the part of Great Britain.

Westlake, vol. 2, pp. 299, 300.

It has been held for at least a hundred and fifty years that neutral merchants may trade in arms, ammunition, and stores of all kinds, in time of war as well as in time of peace. There is thus a conflict between the right of the belligerent state to capture such goods and the right of the neutral individual to trade in them. Modern International Law makes a compromise between them by allowing the subjects of neutral states to carry contraband to either belligerent, but insisting that they do so at their own risk. Their government is not bound to restrain them from trading in the forbidden goods, but neither has it any right to interfere on their behalf if the articles are captured by one belligerent on their way to the other.

Lawrence, p. 699.

Yet whenever a trade in contraband reaches considerable dimensions, the state whose adversary is supplied by means of it is apt to complain. But it invariably receives in reply a reminder that the practice of nations imposes on neutral governments no obligation

to stop such commerce. \* \* \* the most that can be expected of them in the matter of ordinary business transactions is that they shall warn their subjects of the risks run by carriers of contraband merchandise, and give notice that those who incur them will not be protected by the force or influence of the state.

Lawrence, p. 699.

No powerful neutral state has ever interfered to stop a trade in arms and ammunition carried on by its subjects with agents of a belligerent government. It is impossible, therefore, to avoid the conclusion that the only legal restraint on such a trade is the liability of contraband to capture, even under a neutral flag. So clear is this that nearly every writer of repute embodies it in his account of the laws of contraband.

Lawrence, p. 701.

Others \* \* \* have drawn a distinction between large and small commercial transactions. The latter they regard as a continuation of such ordinary trade as may have existed before the war, whereas the former are called into existence by the war and cannot be considered as in any sense a prolongation of the previous operations of neutral merchants.

If these statements are to be regarded as an expression of existing law, it is sufficient to say that the rule they advocate has never been adopted. If, on the other hand, they are held to set forth what the law ought to be, we may remark that the difficulty of drawing a line between a small trade and a large one is so great as to amount to impossibility. Moreover, it is by no means certain that international trade in arms on a large scale is confined to times of war. A firm like Krupp of Essen makes artillery for half the armies of the civilized world during periods of profound peace. And lastly, it may be argued that the burden placed by the proposed rule upon neutral governments would be too great for them to bear. The stoppage of large shipments of arms for belligerent purposes from the ports of a great commercial country would require for its effective enforcement an army of spies and informers. And when a state had dislocated its commerce and roused the anger of its trading classes, it might possibly find itself arraigned before an international tribunal and cast in damages because a few cargoes had slipped through the cordon it maintained against its own subjects.

Lawrence, pp. 701-702.

\* \* \* it does not, according to the International law of the present day, constitute a violation of neutrality if a neutral allows his subjects to supply either belligerent with arms and ammunition in the ordinary way of trade.

Oppenheim, vol. 2, p. 382.

In contradistinction to supply to belligerents by neutrals, such supply by subjects of neutrals is lawful, and neutrals are not, therefore, obliged according to their duty of impartiality to prevent such supply. \* \* \* When in August, 1870, during the Franco-German War, Germany lodged complaints with the British Government for not prohibiting its subjects from supplying arms and ammuni-

tion to the French Government, Great Britain correctly replied that she was not by International Law under the obligation to prevent her subjects from committing such acts.

Oppenheim, vol. 2, pp. 427-428.

The endeavor to make a distinction between supply in single cases and on a small scale on the one hand, and, on the other, supply on a large scale, and to consider only the former lawful, has neither in theory nor in practice found recognition. As International Law stands, belligerents may make use of visit, search, and seizure to protect themselves against conveyance of contraband by sea to the enemy by subjects of neutrals. But so far as their neutral home State is concerned, such subjects may, at the risk of having their property seized during such conveyance, supply either belligerent with any amount of arms, ammunition, coal, provisions, and even with armed ships, provided always that they deal with the belligerents in the ordinary way of commerce.

Oppenheim, vol. 2, p. 428.

There is no doubt that, as the law stands at present, neutrals need not prevent their subjects from supplying belligerents with arms and ammunition. Yet, on the other hand, there is no doubt either that such supply is apt to prolong a war which otherwise would come to an end at an earlier date. But it will be a long time, if ever it happens, before it is made a duty of neutrals to prevent such supply as far as is in their power, and to punish such of their subjects as engage in it.

Oppenheim, vol. 2, p. 429.

\* \* \* [a neutral] need not prevent vessels of his subjects from bringing coal, arms, ammunition, and provisions to belligerent ports, although the supply is destined for the navy and the army of the belligerent. He need not prevent belligerent merchantmen from coming into his ports and carrying arms and the like, bought from his subjects, over to the ports of their home State. And he need not prevent vessels of his subjects from following a belligerent fleet and supplying it *en route* with coal, ammunition, provisions, and the like, provided such supply does not take place in the neutral maritime belt.

Oppenheim, vol. 2, p. 429.

In contradistinction to the theory of International Law, the practice of the States has beyond doubt established the fact that neutrals need not prevent on their territory subscription to loans for belligerents. Thus in 1854, during the Crimean War, France protested in vain against a Russian loan being raised in Amsterdam, Berlin, and Hamburg. In 1870, during the Franco-German War, a French loan was raised in London. In 1877, during the Russo-Turkish War, no neutral prevented his subjects from subscribing to the Russian loan. Again, in 1904, during the Russo-Japanese War, Japanese loans were raised in London and Berlin, and Russian loans in Paris and Berlin. The Second Peace Conference, by enacting in article 7 of Convention V. that a neutral is not bound to prevent the export \* \* \* of anything which can be of use to an army or

fleet, has indirectly recognised that a neutral need not prevent the subscription on his territory to loans for belligerents.

Oppenheim, vol. 2, p. 481.

**Exception—Direct supply of army or navy.**

The case is different when there is no ordinary commerce with a belligerent Government and when subjects of neutrals directly supply a belligerent army or navy, or parts of them. If, for instance, a belligerent fleet is cruising outside the meritime belt of a neutral, the latter must prevent vessels of his subjects from bringing coal, arms, ammunition, and provisions to that fleet, for otherwise he would allow the belligerent to make use of neutral resources for naval operations.

Oppenheim, vol. 2, pp. 428, 429.

The purchasing within, and exporting from the United States, *by way of merchandise*, articles commonly called contraband, being generally warlike instruments and military stores, is free to all the parties at war, and is not to be interfered with.

Hamilton's Treasury circular, August 4, 1793, 1 Am. State Papers, For. Rel., 140.

Again, in 1855, President Pierce, speaking of articles contraband of war, laid down more plainly 'that the laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the government'.

President Pierce's message first session Thirty-fourth Congress; Hall, p. 84.

While all persons may lawfully, and without restriction, by reason of the aforesaid state of war, manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as "contraband of war," yet they can not carry such articles upon the high seas for the use or service of either belligerent, \* \* \* without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf.

Proclamation of the President of the United States, August 22, 1870.

It was held by the Attorney General in 1895 that the mere sale or shipment of arms and munitions of war by persons in the United States to persons in Cuba is not a violation of international law, however strong a suspicion there may be that they are to be used in an insurrection against the Spanish Government.

21 Op. Atty. Gen., 267.

**Contra.**

A neutral State \* \* \* is bound to prevent as much as possible the furnishing of such [military resources] wholesale on the part of its subjects.

German War Book, p. 191.

Contra, with reservations, as to supply of large amount of war resources.

It is otherwise with the supply of contraband of war, that is to say, such things as are supplied to a belligerent for the immediate support of war as being warlike resources and equipment. These may include:

(a) Weapons of war (guns, rifles, sabers, etc., ammunition, powder, and other explosives, and military conveyances, etc.).

(b) Any materials out of which this kind of war supplies can be manufactured, such as saltpeter, sulphur, coal, leather, and the like.

(c) Horses and mules.

(d) Clothing and equipment (such as uniforms of all kinds, cooking utensils, leather straps, and footwear).

(e) Machines, motor-cars, bicycles, telegraphic apparatus, and the like.

All these things are indispensable for the conduct of war, their supply in great quantities means a proportionately direct support of the belligerent. On the other hand, it can not be left out of account that many of the above-mentioned objects also pertain to the peaceable needs of men, i. e., to the means without which the practice of any industry would be impossible, and the feeding of great masses of the population doubtful. The majority of European States are, even in time of peace, dependent on the importation from other countries of horses, machines, coal, and the like, even as they are upon that of corn, preserved foods, store cattle, and other necessities of life. The supply of such articles by subjects of a neutral State may, therefore, be just as much an untainted business transaction and pacific, as a support of a belligerent. The question whether the case amounts to the one or the other is therefore to be judged each time upon its merits. In practice, the following conceptions have developed themselves in the course of time:

(a) The purchase of necessities of life, store cattle, preserved foods, etc., in the territory of a neutral, even if it is meant, as a matter of common knowledge, for the revictualing of the Army, is not counted a violation of neutrality, provided only that such purchases are equally open to both parties.

(b) The supply of contraband of war, in small quantities, on the part of subjects of a neutral State to one of the belligerents is, so far as it bears the character of a peaceable business transaction and not that of an intentional aid to the war, not a violation of neutrality. No Government can be expected to prevent it in isolated and trivial cases, since it would impose on the States concerned quite disproportionate exertions, and on their citizens countless sacrifices of money and time. He who supplies a belligerent with contraband does so on his own account and at his own peril, and exposes himself to the risk of Prize.

(c) The supply of war resources on a large scale stands in a different position. Undoubtedly this presents a case of actual promotion of a belligerent's cause, and generally of a warlike succor. If, therefore, a neutral State wishes to place its detachment from the war beyond doubt, and to exhibit it clearly, it must do its utmost to prevent such supplies being delivered. The instructions to the Customs authorities must thus be clearly and precisely set out, that on the one hand they notify the will of the Government to set their



face against such wanton bargains with all their might, but that on the other, they do not arbitrarily restrict and cripple the total home trade.

In accordance with this view many neutral States, such as Switzerland, Belgium, Japan, etc., did, during the Franco-Prussian War, forbid all supply or transit of arms to a belligerent, whilst England and the United States put no kind of obstacles whatsoever in the way of the traffic in arms, and contented themselves with drawing the attention of their commercial classes to the fact that arms were contraband, and were therefore exposed to capture on the part of the injured belligerent.

It is evident, therefore, that the views of this particular relation of nations with each other still need clearing up, and that the unanimity which one would desire on this question does not exist.

German War Book, pp. 191-195.

Article 7, Hague Convention V, 1907, is substantially identical with section 127, Austro-Hungarian Manual, 1913.

Thus, when in 1793 Great Britain complained of the sale of arms and accoutrements to an agent of the French government in the United States, Jefferson, who was the Secretary of State in Washington's cabinet, replied that American citizens "have always been free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned."

Lawrence, pp. 699-700.

On June 9, 1827, the Secretary of State wrote to the Spanish Chargé that—

"If vessels have been built in the United States and afterwards sold to one of the belligerents and converted into vessels of war, our citizens engaged in that species of manufacture have been equally ready to build and sell vessels to the other belligerent. In point of fact both belligerents have occasionally supplied themselves with vessels of war from citizens of the United States. And the very singular case has occurred of the same shipbuilder having sold two vessels, one to the King of Spain and the other to one of the southern republics, which vessels afterwards met and encountered each other at sea.

"During the state of war between two nations the commercial industry and pursuits of a neutral nation are often materially injured. If the neutral finds some compensation in a new species of industry, which the necessities of the belligerents stimulate or bring into

activity, it can not be deemed very unreasonable that he should avail himself of that compensation, provided he confines himself within the line of entire impartiality, and violates no rule of public law."

Moore's Digest, vol. vii, p. 950.

On October 31, 1827, the Secretary of State wrote to the Spanish Minister as follows:

"Shipbuilding is a great branch of American manufactures, in which the citizens of the United States may lawfully employ their capital and industry. When built they may seek a market for the article in foreign ports as well as their own. The Government adopts the necessary precaution to prevent any private American vessel from leaving our ports equipped and prepared for hostile action, or, if it allow, in any instance, a partial or imperfect armament, it subjects the owner of the vessel to the performance of the duty of giving bond, with adequate security, that she shall not be employed to cruise or commit hostilities against a friend of the United States.

"It may possibly be deemed a violation of strict neutrality to sell to a belligerent vessels of war completely equipped and armed for battle, and yet the late Emperor of Russia could not have entertained that opinion, or he would not have sold to Spain during the present war, to which he was a neutral, the whole fleet of ships of war, including some of the line.

"But if it be forbidden by the law of neutrality to sell to a belligerent an armed vessel completely equipped and ready for action, it is believed not to be contrary to that law to sell to a belligerent a vessel in any other state, although it may be convertible into a ship of war.

"To require the citizens of a neutral power to abstain from the exercise of their incontestable right to dispose of the property, which they may have in an unarmed ship, to a belligerent, would in effect be to demand that they should cease to have any commerce, or to employ any navigation in their intercourse with the belligerent. It would require more—it would be necessary to lay a general embargo, and to put an entire stop to the total commerce of the neutral with all nations; for, if a ship or any other article of manufacture or commerce, applicable to the purpose of war, went to sea at all, it might directly or indirectly find its way into the ports, and subsequently become the property of a belligerent.

"The neutral is always seriously affected in the pursuit of his lawful commerce by a state of war between other powers. It can hardly be expected that he should submit to a universal cessation of his trade, because by possibility some of the subjects of it may be acquired in a regular course of business by a belligerent, and may aid him in his efforts against an enemy. If the neutral show no partiality; if he is as ready to sell to one belligerent as the other; and if he take, himself, no part in the war, he cannot be justly accused of any violation of his neutral obligations."

Moore's Digest, vol. vii, pp. 950, 951.

On October 13, 1855, the Secretary of State wrote to the American Minister to England as follows:

"It is certainly a novel doctrine of international law that traffic by citizens or subjects of a neutral power with belligerents, though it should

be in arms, ammunition, and warlike stores compromits the neutrality of that power. That the enterprise of individuals, citizens of the United States, may have led them in some instances, and to a limited extent, to trade with Russia in some of the specified articles is not denied, nor is it necessary that it should be, for the purpose of vindicating this Government from the charge of having disregarded the duties of neutrality in the present war. \* \* \* Private manufacturing establishments in the United States have been resorted to for powder, arms, and warlike stores, for the use of the allies; and immense quantities of provisions have been furnished to supply their armies in the Crimea. In the face of these facts, open and known to all the world, it certainly was not expected that the British Government would have alluded to the very limited traffic which some of our citizens may have had with Russia, as sustaining a solemn charge against this Government for violating neutral obligation towards the allies. Russia may have shared scantily, but the allies have undoubtedly partaken largely in the benefits derived from the capital, the industry, and the inventive genius of American citizens in the progress of the war; but as this Government has had no connection with these proceedings, neither belligerent has any just ground of complaint against it."

Moore's Digest, vol. vii, pp. 957, 958; 47 Br. and For. State Papers, 421, 424.

"The doctrine of the United States on this subject has always been the same as that of Great Britain, namely, that neutral governments are under no obligation to stop a contraband trade between their subjects and a belligerent power, and that the only penalty of such a trade is the liability of contraband shipments to be captured on the high seas by the other belligerent."

Instructions from Earl Russell, British foreign minister, to Mr. Stuart, British minister to the United States, September 22, 1862.

Late in 1862 the Mexican minister at Washington complained that the exportation of mules and wagons on French account was permitted at New York, and in this relation he adverted to the orders issued by the Government of the United States forbidding the exportation of arms and munitions of war and various other articles most embraced in contraband lists. Mr. Seward, on December 15, 1862, replied that the action of the United States in prohibiting certain exports was a municipal measure due to the exigencies of the war; that it had no reference to the war in Mexico, and gave no preference to either of the belligerents there. "If Mexico," said Mr. Seward, "shall prescribe to us what merchandise we shall not sell to French subjects, because it may be employed in military operations against Mexico, France must equally be allowed to dictate to us what merchandise we shall allow to be shipped to Mexico, because it might be belligerently used against France. Every other nation which is at war would have a similar right, and every other commercial nation would be bound to respect it as much as the United States. Commerce in that case, instead of being free or independent, would exist only at the caprice of war."

Moore's Digest, vol. vii, p. 958; Mr. Seward, Secretary of State to Mr. Romero, Mexican minister, December 15, 1862.

**Benevolent neutrality.**

In a memorandum communicated by Count Bernstorff, Ambassador to Great Britain of the North German Confederation, to the Secretary of Foreign Affairs of Great Britain, on September 1, 1870, objecting to the furnishing of British coal to France, it was said:

"In the first instance there is no question that France has wantonly made war on Germany. The verdict of the world, and especially the verdict of the statesmen as well as of the public of England, has unanimously pronounced the Emperor of the French guilty of a most flagitious breach of peace. Germany, on the other hand, entered into the contest with the consciousness of a good cause. She was, therefore, led to expect that the neutrality of Great Britain, her former ally against Napoleonic aggression, however strict in form, would at least be benevolent in spirit to Germany, for it is impossible for the human mind not to side with one or the other party in a conflict like the present one. What is the use of being right or wrong in the eyes of the world if the public remains insensible to the merits of a cause? Those who deny the necessity of such a distinction forego the appeal to public opinion, which we are daily taught to consider as the foremost of the great powers."

**Reply of British Foreign Office.**

"During the whole of the war (Crimean) arms and other contraband of war were copiously supplied to Russia by the states of the Zollverein, regular agents for traffic were established at Berlin, Magdeburg, Thorn, Königsberg, Posen, Bromberg, and other places and no restraint was put upon their operations. But, besides this, although a decree was published in March, 1854, prohibiting the transit of arms from other countries, and a further decree in March, 1854, prohibiting also the transit of other contraband of war, the transit trade from Belgium continued in full activity throughout the war. The Prussian government, when this state of things was brought to its notice, affirmed, not that it was justified in permitting these exports on the principle of 'benevolent neutrality,' but that it could not interfere with the course of trade; an answer which would seem to have been based rather on the principle that the first duty of Prussia, as a neutral, was to consider the interests of her own subjects, not those of the subjects of a country which had engaged itself in a war with which Prussia had no concern."

"Such was the attitude of Prussia at that time, and such her justification of that attitude. In what point does the analogy fail? Prussia was neutral then as Great Britain is now. Your Excellency alluded to the magnitude of the respective wars. A war in which the energies of five European powers were taxed to the utmost can, perhaps, hardly be justly described as a war waged in remote regions for remote interests; but this point seems scarcely worthy of contention. Your Excellency can hardly mean to say that principles of this importance are to be decided on questions of degree. If no weightier objection than this can be adduced, the analogy would appear to be complete."

Earl Granville to Count Bernstorff, September 15, 1870.

In the summer of 1879 the captain of a steamer bound from Panama to Callao declined to take on board five large packages which

were bound from New York to Callao, and which, on examination, were found to contain "a torpedo launch, in five sections, ready to be set up." It was stated that other consignments of like character were to follow. At the instance of a United States customs inspector at Panama the Treasury Department solicited the views of the Department of State as to whether the transaction, assuming that the articles were to be delivered to the Government of Chile or of Peru, involved an infraction of the neutrality laws of the United States. Mr. Evarts, after conference with the Secretary of the Treasury and incidentally with the Chilean minister, and after having caused the question to be examined by the law officer of the Department of State, stated that the only legal provision, if any, applicable to the case was section 5283 of the Revised Statutes, and that he was "clearly of opinion that the simple manufacture and shipment of such materials [as those in question] as merchandise would not be in violation of the provisions of that section. Uniform and repeated rulings of the executive and judicial branches of the Government," said Mr. Evarts, "in regard to the true interpretation of the neutrality laws of the United States in the case of even completed seagoing vessels, make it clear that the facts respecting this material stated by Inspector Carter, if the same was found within the jurisdiction of the United States, would not present a case of the violation of the provisions of section 5283 of the Revised Statutes. The articles in question are, as before stated, doubtless contraband of war, and are sold, shipped, and purchased at the peril and risk of capture. Subject to such risk, they continue to be a legitimate element of commerce to the citizens of the United States, a neutral power, with either of the belligerents in time of war, in the same manner and to the same extent as they would be in time of peace, and afford no ground for the interference of the executive officers of the United States, either within their own jurisdiction or elsewhere, with such a mercantile transaction."

Moore's Digest, vol. vii, pp. 960, 961; Mr. Evarts, Secretary of State to Mr. Sherman, Secretary of Treasury, November 14, 1879.

On March 25, 1885, the Secretary of State wrote the Colombian Minister that: "The existence of a rebellion in Colombia does not authorize the public officials of the United States to obstruct ordinary commerce in arms between citizens of this country and the rebellious or other parts of the territory of the Republic of Colombia. It is a well-established rule of international law that the allowance of such commerce is no breach of duty towards the friendly government whose enemies may thus be supplied with arms. As no charge is made that the vessels in question are armed vessels intended for the use of the rebels mentioned, or that military expeditions are being set on foot in this country against the Republic of Colombia, the duties of this Government are limited to the enforcement of the statutory provisions which apply to such cases."

Moore's Digest, vol. vii, p. 962; For. Rel. 1885, 238.

On June 1, 1885, the Secretary of State instructed the American Chargé at Peking that: "It is also to be observed that the fact that certain articles of commerce are contraband does not make it a breach of neutrality to export them. There has not been, since the organiza-

tion of our Government, a European war in which, in full accordance with the rules of international law, as accepted by the United States, munitions of war have not been sent by American citizens to one or both of the belligerents; yet it has never been doubted that these munitions of war, if seized by the belligerent, against whom they were to be used, could have been condemned as contraband."

Moore's Digest, vol. vii, p. 963; For. Rel. 1885, 172.

**United States Government will not press claim of its citizens against a foreign government arising out of sale of contraband goods.**

In a letter declining to urge the claim of an American citizen against the Government of Guatemala for the payment of drafts given for the purchase of arms, the Department of State said: "There is a vast difference between the degree of repressive control which this government may be called upon to exert over its citizens in the pursuance of its neutral duties and the extent to which it may be permitted to go in actively aiding them to secure the fulfillment of contracts entered into in aid of a belligerent. For example, it is no offence either against the law of nations or against our neutrality statutes for a citizen of the United States to sell munitions of war to a belligerent; yet it could scarcely be contended that this government would be justified in employing its agents to promote such transactions. Such conduct, it is conceived, would be highly unneutral. It is the duty of this government to abstain from aiding a belligerent in hostilities against a friendly power. Such was the view of this Department in 1868, when it refused to yield its good offices in behalf of American citizens holding bonds of Chile and Peru issued in aid of a war with Spain in 1866. In that case the transaction was as innocent as any of the contracts with Mr. Segur could possibly have been. But the Department declared that 'the negotiation of a loan for the purpose of hostilities against a friendly power, with which the United States are at peace, is an unneutral act.' The government, it was further said, was asked to exert its friendly offices in a matter addressed 'to its discretion' and 'not founded upon a right to interposition,' and 'Spain might find ground to complain that this government patronizes a contribution by citizens of the United States to funds of her enemies for war purposes.'"

Mr. Rives, Acting Secretary of State, to Messrs. Morris and Fillette, October 13, 1888; Moore's Digest, vol. vii, p. 865.

Article 20 of the treaty between the United States and Hayti, of November 3, 1864, provides that "liberty of navigation and commerce shall extend to all kinds of merchandise, excepting those only which are distinguished by the name of contraband of war." The article then specifies the things which shall be comprehended under that designation. Article 21 stipulates that "all other merchandises and things" not comprehended in the list shall be considered as subject of free and lawful commerce, which may be transported in the freest manner by the citizens of both contracting parties, even to places belonging to an enemy, excepting only such as may be besieged or blockaded. The Haytian minister at Washington asked that the United States, on the strength of these stipulations, take steps to prevent the exportation of articles contraband of war to Hayti. The United States dissented from this construction of the

treaty. It was not unusual, said the Department of State, to find in the treaties of the United States specifications of what things should be regarded as contraband of war between the contracting parties. Such provisions, however, had never been held to bind either government to prevent its citizens from exporting such things to the territory of any other country under any circumstances whatever. The United States had uniformly maintained the position taken by Mr. Jefferson, as Secretary of State, that "our citizens have always been free to make, vend, and export arms."

Moore's Digest, vol. vii, p. 964; Mr. Bayard, Secretary of State, to Mr. Preston, Haytian Minister, November 28, 1888, For. Rel. 1888, I. 1000.

On Mar. 13, 1891 the Secretary of State wrote the Chilean minister as follows:

"I have the honor to acknowledge the receipt of your note of the 10th instant, in which you inform me that your Government has prohibited, until further orders, the importation into the Republic of arms and munitions of war of all kinds.

"In conveying this information you request me, if possible, to communicate this decree to the custom-houses of the United States in order that the shipment of such articles to Chile may be prevented; and in this relation you state that an agent of the insurgents in Chile has arrived in the city of New York for the purpose of purchasing arms and munitions of war.

"The laws of the United States on the subject of neutrality, which may be found under title LXVII of the Revised Statutes, while forbidding many acts to be done in this country which may affect the relations of hostile forces in foreign countries, do not forbid the manufacture and sale of arms or munitions of war. I am therefore at a loss to find any authority for attempting to forbid the sale and shipment of arms and munitions of war in this country, since such sale and shipment are permitted by our law. In this relation it is proper to say that our statutes on this subject are understood to be in conformity with the law of nations, by which the traffic in arms and munitions of war is permitted, subject to the belligerent right of capture and condemnation."

Moore's Digest, vol. vii, pp. 964, 965; For. Rel. 1891, 314.

On Sept. 22, 1892, the Secretary of State wrote the Venezuelan Minister that "The sale of arms and munitions of war, even to a recognized belligerent, during the course of active hostilities, is not in itself an unlawful act, although the seller runs the risk of capture and condemnation of his wares and contraband of war."

Moore's Digest, vol. vii. p. 965; For. Rel. 1892, 645.

On July 15, 1896, the Secretary of State wrote the Spanish Minister as follows:

"If, in characterizing this country as a base of operations against Spain, it be meant that the Cuban insurgents procure the larger part of their military supplies here, the fact may be so, though the means of comparing other countries, the British West Indies in particular, with the United States are not at hand. But the comparison is of no importance, and it would be of no consequence if the insurgents derived their whole stock of warlike equipment from the United

States. The citizens of the United States have a right to sell arms and munitions of war to all comers—neither the sale nor the transportation of such merchandise, except in connection with and in furtherance of a military expedition prosecuted from our shores, are a breach of international duty or give Spain any ground of complaint—and the denunciation of such acts as evidencing ‘criminal conspiracy,’ or as showing United States territory to have become a base of operations against Spain, is greatly to be deprecated as without sufficient warrant in law or in fact, and as therefore ill calculated to promote the harmonious relations of the two countries.

Moore's Digest, vol. vii. pp. 965, 966.

“Regarding the trade in arms and ammunition and other contraband objects, the Government of the King, looking to the strict observance of the duties prescribed by neutrality, does not intervene either to protect or prohibit it. No law prohibiting the exportation of these products of national industry, the trade in question is carried on freely in the country, but outside the territory at the risks and perils of those who carry it on. If Belgian merchandise of this kind, or vessels transporting it flying the national flag, were stopped and seized on the high seas by the cruisers of one of the belligerents, the intervention of the Government would be confined to seeing that the laws of war and the regulations of the procedure before the prize courts were strictly applied to all parties interested.”

M. de Favereau, Belgian foreign minister to the American minister to Belgium, September 6, 1898, inclosed by latter with despatch to United States State Department, No. 140, September 14, 1898.

On Dec. 15, 1899, the Secretary of State wrote to the Consul from the Orange Free State as follows:

“I have the honor to acknowledge the receipt of your letter of the 11th instant, in which you quote a letter received from Doctor Hendrik Muller, envoy extraordinary of the Orange Free State, dated The Hague, November 28 last, in which he calls your attention to the alleged shipment of material, contraband of war, by the English Government on a large scale from the United States, maintains that such shipment is contrary to the law of nations, and suggests your remonstrating with this Government against the continuance of such irregularities.

“In reply I have the honor to quote from 1 Kent's Commentaries, page 142, concerning the well-established doctrine as to the law of nations on the subject. Chancellor Kent said:

“‘It was contended on the part of the French nation in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war, to the belligerent powers. It was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry, themselves, to the belligerent powers, contraband articles, subject to the right of seizure, *in transitu*. The right has since been explicitly declared by the judicial authorities of this country.’

“Mr. Justice Story, in the case of *The Santissima Trinidad* (7 Wheaton, 340), used the following language:

“‘There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of



war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

"In the case of *The Bermuda*, 3 Wallace, 514, Chief Justice Chase said:

"Neutrals in their own country may sell to belligerents whatever belligerents choose to buy. The principal exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other," etc.

"An examination of Wharton's Digest of International Law, section 391, will make it clear that the Executive Departments of this Government from the earliest period have maintained the correctness of the doctrine stated by Chancellor Kent, and that, in this position, they have been supported by the decisions of the courts of the United States and by the opinions of eminent authorities on international law.

"Under the circumstances, therefore, and in view of the fact that the law on the subject in the United States is well settled, the Department does not consider it necessary to cause an investigation as to the correctness of the facts alleged by Doctor Muller."

Moore's Digest, vol. vii, pp. 969, 970.

*Seton v. Lowe*, 1 Johnson, 1.—In the course of his decision upholding an insurance contract based on neutral trade in contraband goods, Kent, J., said:

"On the first point I am of opinion that the contraband goods were lawful goods, and that whatever is not prohibited to be exported, by the positive law of the country, is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law (and which, so far as it concerns the present question, is expressly incorporated into our treaty of commerce with Great Britain) contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force, but the fact is that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent Powers; and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet, at the same time, from the law of necessity, as Vattel observes, the Powers at war have a right to seize and confiscate the contraband goods, and this they may do from the principle of self-defence. The right of the hostile Power to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights which may, at times, reciprocally clash and injure each other. But this collision is the effect of inevitable necessity, and the neutral has no just cause to complain. A trade by a neutral in articles contraband of war is, therefore, a lawful trade, though a trade, from necessity, subject to inconvenience and loss."

Armed vessels may be sent to foreign ports for sale.

*The "Santissima Trinidad,"* 3 Wheaton, 283.—In this case the capturing vessel was sent by her owners after being armed, from

Baltimore to Buenos Ayres, with authority to the supercargo to sell her in the latter port. She sailed under the protection of the American flag during the voyage and committed no hostilities until her arrival in Buenos Ayres, where she was sold apparently in good faith and commissioned as a national ship.

The Court said: "The question as to the original illegal armament and outfit of the *Independencia* may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bona fide* sale (and there is nothing in the evidence before us to contradict it), there is no pretence to say, that the original outfit on the voyage was illegal, or that a capture made after the sale was, for that cause alone, valid."

See also, *United States v. The Meteor*, 3 American Law Review, 173.

*Ex parte Charasse, in re Grazebrook*, 34 L. J. N. S., *Bankruptcy*, 17.—Referring to the furnishing of contraband articles to the Confederacy, during the Civil War, Lord Westbury said:

"But this commerce, which was perfectly lawful for the neutral with either belligerent country before the war, is not made by the war unlawful and capable of being prohibited by both or either of the belligerents. All that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent Power to whose country the cargo is destined."

In the case of *United States v. Trumbull*, 48 Fed. Rep. 99, the Court said: "But I think it perfectly clear that the sending of a ship from Chile to the United States, to take on board arms and ammunition purchased in this country, and carry them back to Chile, is not the beginning, setting on foot, providing or preparing the means of any military expedition or enterprise—within the meaning of section 5286 of the Revised Statutes."

*Hendricks v. Gonzalez*, 67 Fed. Rep., 351.—Wallace, Circuit Judge, said: "It is not an infraction of international obligation to permit an armed vessel to sail or munitions of war to be sent from a neutral country to a belligerent port, for sale as articles of commerce; and neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerents, articles which are contraband of war. \* \* \* There was not a particle of evidence brought to the attention of the collector tending to show that the vessel was intended to be employed in acts of war. It is not enough that it was the purpose of her intended voyage to transport arms and munitions war for the use of the insurrectionary party in Venezuela."

*United States v. The Laurada*, 85 Fed. Rep., 760.—In this case it was stated by the court that the neutrality laws are not designed to interfere with commerce, even in contraband of war, but merely to prevent distinctly hostile acts, as against a friendly power, which tend to involve this country in war.

Courts in the United States will enforce contracts for the transportation of contraband articles.

Northern Pac. Ry. Co. v. American Trading Co., 195 U. S., 439, 465.

*Pearson v. Parson*, 108 Fed. Rep., 461.—The complainants, Samuel Pearson and others, alleged that they were owners of property situated in the Southern African Republic and the Orange Free State, and that Great Britain was seeking by means of arms to destroy said property of complainants in a war between England and the South-African Republic and the Orange Free State, begun in 1899.

The complaint further alleged that Great Britain had been dispatching large quantities of mules and horses, etc., from New Orleans to be used in the war, and was about to load other ships with similar material.

The Bill prayed for an injunction prohibiting the defendants from loading on the ship "Anglo-Australian" and other vessels, mules and horses to be used in the war.

It was conceded on the argument that the court had no jurisdiction of this cause *ratione personarum*. The complainants sought to maintain the jurisdiction *ratione materiae* by a claim of right under the treaty of Washington of May 8, 1871, between Great Britain and the United States relative to the "Alabama claims", in which treaty it is declared that:

"A neutral government is bound . . . not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men."

Held, that the case was a political one, of which a court of equity could "take no cognizance, and which, in the very nature of governmental things, must belong to the executive branch of the government."

However, the court said that it was almost inconceivable that the "United States intended by the above declaration of the treaty to subvert the well established principle of international law that the private citizens of a neutral nation can lawfully sell supplies to belligerents," and thus have "provided for the most serious and extensive derangement of and injury to the commerce of our citizens whenever two or more foreign nations should go to war; and it would seem that there is nothing in the treaty, especially when its history and purposes are considered, which would warrant the belief that the United States insisted upon inserting therein a new principle of international law, from which the greatest damage might result to the commerce of this country, and which was absolutely different from and antagonistic to the rule and policy which the government of this country had theretofore strenuously and invariably followed. The principle that neutral citizens may lawfully sell to

belligerents has long since been settled in this country by the highest judicial authority."

The court further said: "If a belligerent may come to this country and buy munitions of war, it seems clear that he may export them as freight in private merchant vessels of his own or any other nationality, as cargo could be exported by the general public."

#### LOANS OF MONEY.

June 17, 1823. the British law officers rendered the following opinion:

To the Right Hon. GEORGE CANNING, M. P., &c.

DOCTORS' COMMONS, *June 17, 1823.*

SIR,—We have been honoured with your commands, signified in Mr. Planta's letter of the 12th inst., stating that you were desirous that we should report our opinion on the following questions:—

1. Whether subscriptions for the use of one of two belligerent States by individual subjects of a nation professing and maintaining a strict neutrality between them be contrary to the law of nations, and constitute such an offence as the other belligerent would have a right to consider as an act of hostility on the part of the neutral Government?

2. If such individual voluntary subscriptions in favour of one belligerent would give such just cause of offence to the other, whether loans for the same purpose would give the like cause of offence?

3. And, if not, where is the line to be drawn between a loan at an easy or mere nominal rate of interest, or a loan with a previous understanding that interest would never be exacted, and a gratuitous voluntary subscription?

In obedience to your commands, we beg leave to report that we have taken the same into our consideration, and we are of opinion that subscriptions of the nature above alluded to, for the use and avowedly for the support of one of two belligerent States against the other, entered into by individual subjects of a Government professing and maintaining neutrality, are inconsistent with that neutrality, and contrary to the law of nations; but we conceive that the other belligerent would not have a right to consider such subscriptions as constituting an act of hostility on the part of the Government, although they might afford just ground of complaint, if carried to any considerable extent. With respect to loans, if entered into merely with commercial views, we think, according to the opinions of writers on the law of nations, and the practice which has prevailed, that they would not be an infringement of neutrality; but if, under colour of a loan, a gratuitous contribution was afforded without interest, or with mere nominal interest, we think such a transaction would fall within the opinion given in answer to the first question.

We have the honour to be, &c.,

CHRISTOPHER ROBINSON (King's Advocate),  
R. GIFFORD (Attorney-General),  
J. S. COPLEY (Solicitor-General).

Since money is truly described as the sinews of war, and it is no part of the business of a state to deal in money, its loan by a neutral state to a belligerent would necessarily have a special character, not only as aiding the latter in fact but also as disclosing an intent to aid him in his war. It would therefore be an unneutral act. If by the law of the neutral state the consent of the executive is required to loans by individuals to foreign powers, or if the executive is in the habit of practically controlling such operations by the exercise of its influence, a loan by individuals to a belligerent which is allowed to slip through the meshes will have an international character not distinguishable from a loan by the state. But in countries where, as in England, the loan market is free in time of peace, the question arises whether the state is bound to interfere with it in time of war by a prohibition to lend to belligerents. In such a country loans to foreign states are not political but commercial acts, falling within the daily habits of persons engaged in business, not implying any intent by those persons as to the use to be made of the money by the governments assisted, and such that to prevent them just when the greatest profit is likely to be obtained from them would be felt to be an onerous interposition. They do not constitute a participation in any specific operation of war, nor is the branch of business to which they belong reserved for public action by the general understanding of the civilised world. Tried therefore by the tests which have been suggested as imposed by the theory of neutrality, loans by neutral individuals to belligerent states must be pronounced legitimate, and such they are in fact held to be.

Westlake, vol. 2, pp. 251, 252.

In the war between Great Britain and the South African Republics loans were openly negotiated for the British Government in the United States and elsewhere, and the same thing has taken place in the war between Russia and Japan.

Moore's Digest, vol. vii, p. 978.

In April, 1904, the commandant of the Mare Island Navy-Yard transmitted to the Secretary of the Navy copies of circulars received in an envelope from the consulate-general of Japan at New York City, addressed "To the Japanese Serving in the United States Navy," soliciting subscriptions to Japanese bonds and contributions to the relief fund for Japanese soldiers and sailors and to the Red Cross Society of Japan. In view of the President's proclamation of neutrality, the Secretary of the Navy asked whether the circulars should be forwarded. It was held by the Department of State that, while Japanese in the United States doubtless had a right to make such subscriptions and contributions as were referred to, it was undesirable that they should be solicited through American official channels, and the commandant of the Mare Island Navy-Yard was instructed not to forward any of the circulars to Japanese in the United States. The legation of Japan was so notified.

Moore's Digest, vol. vii, p. 869; For. Rel. 1904, p. 427.

The most indispensable means for the conduct of a War is money. For this very reason it is difficult to prevent altogether the support

of one or other party by citizens of neutral States, since there will always be Bankers who, in the interest of the State in whose success they put confidence, and whose solvency in the case of a defeat they do not doubt, will promote a loan. Against this nothing can be said from the point of view of the law of nations; rather the Government of a country cannot be made responsible for the actions of individual citizens, it could only accept responsibility if business of this kind was done by Banks immediately under the control of the State or on public Stock Exchanges.

German War Book, p. 191.

In the case of *DeWutz v. Hendricks*, 9 *Moore*, 586, Lord Chief Justice Best expressed the opinion that it was contrary to the law of nations, for persons residing in England "to enter into engagements to raise money, by way of loan, for the purpose of supporting subjects of a foreign state in arms against a government in alliance with our own; and that no right of action could arise out of such a transaction."

See also *Kennett v. Chambers*, 14 *Howard*, 38.

USE BY BELLIGERENT OF COMMUNICATING APPARATUS BELONGING TO NEUTRAL, OR TO COMPANIES OR INDIVIDUALS—NEUTRAL NOT CALLED UPON TO PROHIBIT.

**A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to Companies or private individuals.—*Hague Convention V, 1907, Article 8.***

**Contra.**

It is understood that the liberty of the neutral State to transmit dispatches does not imply the right to make use or permit use thereof manifestly for the purpose of lending assistance to one of the belligerents.

In applying the preceding rules, no difference is to be made between State cables and cables owned by individuals, nor between cables which are enemy property and those which are neutral property.

Institute, 1902, p. 162.

**Contra.**

There is no doubt that a state is bound in principle not knowingly to allow the use of its services for the reception and transmission of letters or telegrams, the latter whether wireless or not, in furtherance of belligerent interests; and where any such service is not a state monopoly, its exercise in the territory by a private undertaking ought to be subject to a similar restraint. Such use of the service would be a direct aid to the belligerent, an implication in the operations which were combined by means of it, and would make the territory a base of operations to that extent. There is however great difficulty in making any practical application of the principle. The contents of letters cannot be known without an intolerable violation of the secrecy of the post office, and the true meaning of telegrams may be concealed by cipher, or by the employment of common words and names arranged to convey to the recipient a sense which others cannot penetrate. It does not seem possible for a neutral state to do more than to refuse for itself, and prohibit for the private undertakings in its territory, the reception and transmission of messages in cipher, or in common language which from its want of apparent sense may be inferred to be the equivalent of cipher, when those messages appear from their address to be intended for the benefit of a belligerent operation. In the instructions issued in 1898 by Brazil, Art. 5 ran that "it is prohibited to citizens, or aliens residing in Brazil, to announce by telegraph the departure or near arrival of any ship, merchant or war, of the belligerents, or to give them any orders,

instructions or warnings with the purpose of prejudicing the enemy." This seems to go too far, since suppression of the information usually given of the movement of shipping, however intended to deny assistance to one belligerent, might operate as an assistance to the other.

Westlake, vol. 2, pp. 253, 254.

In 1898 "the cables from neutral points during the Spanish American War \* \* \* did much in furnishing information which the scouting vessels were unable to obtain." We are told this on American authority [U. S. Naval War College, *International Law Situations*, 1904, p. 99], and it shows conclusively that neutral powers would do well to exercise the discretion given them by the Second Hague Conference in favor of such regulation and restriction as proves to be possible. The prevention of open and unrestricted use of telegraphic or wireless communication would surely be feasible though it would probably prove a hopeless task to stop the sending of warlike information in the guise of apparently harmless messages.

Lawrence, p. 647.

Since, therefore, everything is left to the discretion of the neutral concerned he will have to take the merits and needs of every case into consideration, and act accordingly. But so much is certain that a belligerent may not categorically request neutrals to forbid or restrict such employment of their telegraph wires and the like on the part of his adversary.

Oppenheim, vol. 2, p. 435.

Article 8, Hague Convention V, 1907, is substantially identical with section 235, *Austro-Hungarian Manual*, 1913.

**Contra to some extent.**

On May 2, 1898, the consul of the United States at Barbados, British West Indies, telegraphed that the governor of the colony, under instructions from the home Government, controlled the cable office and would not permit messages to be sent out relative to the movements of war ships, whether Spanish or American.

Moore's Digest, vol. vii. p. 941; Mr. Adee, Second Assistant Secretary of State, to Secretary of Navy, May 3, 1898.



RESTRICTIONS OR PROHIBITIONS ENFORCED BY NEUTRAL AS TO EXPORT OR TRANSPORT OF WAR-SUPPLIES TO BELLIGERENTS AS WELL AS TO USE OF APPARATUS OF COMMUNICATION MUST BE IMPARTIALLY APPLIED.

Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles VII and VIII must be impartially applied by it to both belligerents.

A neutral Power must see to the same obligation being observed by Companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.—*Hague Convention V, 1907, Article 9.*

The neutral is not to favor one [belligerent party] to the detriment of the other; and it is an essential character of neutrality to furnish no aids to one party which the neutral is not equally ready to furnish to the other.

Kent, vol. 1, p. 122.

The rights of neutrality are connected with correspondent duties. Among these duties is that of impartiality between the contending parties. The neutral is the common friend of both parties, and consequently is not at liberty to favor one party to the detriment of the other.

Dana's Wheaton, p. 509.

To furnish succors, or auxiliaries, or to extend privileges to one belligerent, to the detriment of the other, is undoubtedly a violation of strict neutrality, and, as such, is a just cause of complaint, if not of war.

Halleck, p. 515.

It is true that any national enactment, whether exceeding or not the limits of international duty, must be enforced in favour of both belligerents if it is enforced in favour of either. A neutral must be impartial, though it is not enough that he should be impartial if he does not abstain from participation in the war. But he is within his right if he declines to enforce in favour of either belligerent an enactment with which he has armed himself only in pursuance of his own policy or for his own greater security.

Westlake, vol. 2, p. 209.

The effect of all these provisions [Articles 3, 5, 8, and 9 of Convention V, and Articles 5 and 25 of Convention XIII of the Second Hague Conference] when taken together is to draw a broad line of

distinction between means of information owned and controlled by the belligerent himself on neutral territory or in neutral territorial waters, and similar means owned and controlled by the neutral state or by private persons and companies within its jurisdiction. Neutral governments are bound to prevent the erection of the former during the war, and the use of anything of the kind established before the war and not previously opened to the public for the transmission of messages. The latter they are free to deal with as they please on the sole condition that they act impartially as between the belligerents.

Lawrence, pp. 646-647.

\* \* \* the duty of impartiality *includes* the equal treatment of both belligerents regarding such facilities as do not directly concern military or naval operations, and which may, therefore, be granted or not to belligerents, according to the discretion of a neutral. If a neutral grants such facilities to one belligerent, he must grant them to the other in the same degree.

Oppenheim, vol. 2, p. 382.

What is principally required of a neutral State is equal treatment of both belligerents.

German War Book, p. 187.

Article 9, Hague Convention V, 1907, is substantially identical with section 236, Austro-Hungarian Manual, 1913.

NEUTRAL'S RESISTANCE TO VIOLATION OF ITS NEUTRALITY NOT HOSTILE ACT.

**The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act.**—*Hague Convention V, 1907, Article 10.*

It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made, under neutral protection, the neutral is bound to redress the injury, and effect restitution.

Kent, vol. 1, p. 124.

If the respect due to neutral territory be violated by one party, without being promptly punished by just animadversion, it would soon provoke a similar treatment from the other party, and the neutral ground would become the theatre of war.

Kent, vol. 1, p. 126.

If, however, a neutral does not attack a belligerent, but only repulses him by force when he violates or attempts to violate the neutrality of the neutral, such repulse does not comprise hostilities.

Oppenheim, vol. 2, p. 387.

It was stated by the Attorney General of the United States in 1855, that every neutral nation has a right to exact by force, if need be, that belligerent powers shall not make use of its territory for the purposes of their war.

7 Op. Atty. Gen., 122.

If the territory of a neutral State is trespassed upon by one of the belligerent parties for the purpose of its military operations, then this State has the right to proceed against this violation of its territory with all the means in its power and to disarm the trespassers. If the trespass has been committed on the orders of the Army Staff, then the State concerned is bound to give satisfaction and compensation; if it has been committed on their own responsibility, then the individual offenders can be punished as criminals. If the violation of the neutral territory is due to ignorance of its frontiers and not to evil intention, then the neutral State can demand the immediate removal of the wrong, and can insist on necessary measures being taken to prevent a repetition of such contempts.

German War Book, pp. 197, 198.

Article 10, Hague Convention V, 1907, is substantially identical with section 237, Austro-Hungarian Manual, 1913.

RIGHTS AND DUTIES OF NEUTRAL WITH RESPECT TO BELLIGERENT TROOPS ON ITS TERRITORY.

**A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.**

**It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.**

**It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.**

**In the absence of a special Convention to the contrary, the neutral Power shall supply the interned with the food, clothing, and relief required by humanity.**

**At the conclusion of peace the expenses caused by the internment shall be made good.**—*Hague Convention V, 1907, Articles 11 and 12.*

A neutral State which receives in its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.

It can keep them in camps, and even confine them in fortresses or locations assigned for this purpose.

It shall decide whether officers may be left at liberty on giving their parole that they will not leave the neutral territory without authorization.

Hague Convention II, 1899, Article 57.

Failing a special convention, the neutral State shall supply the interned with the food, clothing, and relief required by humanity.

At the conclusion of peace, the expenses caused by the internment shall be made good.

Hague Convention II, 1899, Article 58.

The neutral state receiving in its territory troops belonging to the belligerent armies will intern them, so far as it may be possible, away from the theater of war.

They may be kept in camps, or even confined in fortresses or in places appropriated to this purpose.

It will decide whether the officers may be released on giving their parole not to quit the neutral territory without authority.

Project of Brussels Conference, 1874, Article LIII.

In default of a special agreement, the neutral state which receives the belligerent troops will furnish the interned with provisions, clothing, and such aid as humanity demands.

The expenses incurred by the internment will be made good at the conclusion of peace.

Project of Brussels Conference, 1874, Article LIV.

A neutral State on whose territory troops or individuals belonging to the armed forces of the belligerents take refuge should intern them, as far as possible, at a distance from the theater of war.

It should do the same towards those who make use of its territory for military operations or services.

The interned may be kept in camps or even confined in fortresses or other places.

The neutral State decides whether officers can be left at liberty on parole by taking an engagement not to leave the neutral territory without permission.

In the absence of a special convention concerning the maintenance of the interned, the neutral State supplies them with the food, clothing, and relief required by humanity.

It also takes care of the matériel brought in by the interned.

When peace has been concluded, or sooner if possible, the expenses caused by the internment are repaid to the neutral State by the belligerent State to which the interned belong.

Institute, 1880, pp. 40, 41.

It is, consequently, the duty of the neutral to order the immediate disarming of all belligerent troops which enter neutral territory as an asylum, to cause them to release all their prisoners, \* \* \*.

Halleck, p. 524.

Publicists make a marked distinction between the duties of neutrals, with respect to the asylum which may be afforded to belligerent ships, and that which may be afforded to belligerent forces on land. This difference, says Heffter, results from the immunity of the flag, and the principle that ships are considered as a portion of the territory of the nation to which they belong. Hence the allowable custom of asylum in neutral waters, and the want of power in the neutral to interfere with internal organization of such vessels, when not armed or equipped within its jurisdiction. On the other hand, troops are not a part of the territory of the nation to which they belong, nor has their flag any immunity on neutral soil. While, therefore, individuals, as such, are entitled, by the laws of humanity, to the right of asylum in neutral territory, such asylum can not be demanded by, nor can it be granted, without a violation of neutral duty, to an army as a body. It is, consequently, the duty of the neutral to order the immediate disarming of all belligerent troops which enter neutral territory as an asylum, to cause them to release all their prisoners, and to restore all booty which they may bring with them. If he neglect to do this, he makes his own territory the theater of war, and justifies the other belligerent in attacking such refugees within such territory, which is no longer to be regarded as neutral.

Halleck, p. 524.

So asylum is allowed within neutral territory \* \* \* to a defeated or fugitive belligerent force, and the victor must stop his pursuit at the borders. The conditions, however, according to which refugees shall be received, are not absolutely settled. In the case of troops fleeing across the borders, justice requires that they shall be protected, not as bodies of soldiers with arms in their hands, but as individual subjects of a friendly state: they are, we believe, in practice generally disarmed, and supported in their place of shelter at the expense of their sovereign. The other course would be unfriendly, as protected soldiers might issue forth from a friend's territory all ready for battle; and would also tend to convert the neutral soil into a theatre of war.

Woolsey, p. 272.

Perhaps the only occasion which hostilities on land afford to the neutral of extending his hospitality to belligerent persons other than those who resort to his country for commercial or private reasons, and who have therefore no relation to the war, is when a beaten army or individual fugitives take refuge in his territory from the pursuit of their enemy. Humanity and friendship alike recommend him to receive them, but his duty to the other belligerent requires that they shall not again start from his soil in order to resume hostilities; and it has been the invariable practice in late wars to disarm troops crossing the neutral frontier and to intern them till the conclusion of peace.

Hall, pp. 649, 650.

**Contra, to some extent.**

It would be intolerably burdensome to a neutral state to maintain as guests for a long time any considerable body of men; on the other hand, by levying the cost of their support upon the belligerent an indirect aid is given to his enemy, who is relieved from the expense of keeping them and the trouble of guarding them as prisoners of war, while he is as safe from the danger of their reappearance in the field as if they were in his own fortresses. Perhaps the equity of the case and the necessity of precaution might both be satisfied by the release of such fugitives under a convention between the neutral and belligerent states by which the latter should undertake not to employ them during the continuance of the war.

Hall, p. 650.

The expenses to which it [a neutral state] is put in consequence of their presence [interned troops] should be repaid by their own government.

Lawrence, p. 623.

The only other case in which bodies of soldiers may be permitted to cross neutral borders occurs when they are driven over them by the enemy. In such circumstances humanity forbids that they should be forced back to captivity or death by lines of neutral bayonets; but at the same time impartiality demands that they shall not be allowed to use the territory they have entered as a place of refuge, in which, safe from pursuit, they can reorganize their shattered forces, and from which they can sally forth to renew the conflict when occa-

sion offers. The two are reconciled by the practice of disarming them as soon as they cross the frontier and retaining them in honorable detention till the conclusion of the war. This is called *interning*, and the troops so treated are said to be *interned*. They are bound to submit to the process and to make no attempt to compromise the neutrality of the state in which they find asylum.

Lawrence, pp. 622-623.

On occasions during war large bodies of troops, or even a whole army, are obliged to cross the neutral frontier for the purpose of escaping captivity. A neutral need not permit this, and may repulse them on the spot, but he may also grant asylum. It is, however, obvious that the presence of such troops on neutral territory is a danger for the other party. The duty of impartiality incumbent upon a neutral obliges him, therefore, to disarm such troops at once, and to guard them so as to insure their not again performing military acts against the enemy during the war.

Oppenheim, vol. 2, pp. 413-414.

It is usual for troops who are not actually pursued by the enemy—for if pursued they have no time for it—to enter through their commander into a convention with the representative of the neutral concerned, stipulating the conditions upon which they cross the frontier and give themselves into the custody of the neutral. Such conventions are valid without needing ratification, provided they contain only such stipulations as do not disagree with International Law and as concern only the requirements of the case.

Oppenheim, vol. 2, p. 414.

Stress must be laid on the fact that, although the detained troops are not prisoners of war captured by the neutral, they are nevertheless in his custody, and therefore under his disciplinary power, just as prisoners of war are under the disciplinary power of the State which keeps them in captivity. \* \* \* As the neutral is required to prevent them from escaping, he must apply stern measures, and he may punish severely every member of the detained force who attempts to frustrate such measures or does not comply with the disciplinary rules regarding order, sanitation, and the like.

Oppenheim, vol. 2, pp. 414-415.

The most remarkable instance known in history is the asylum granted by Switzerland during the Franco-German war to a French army of 85,000 men with 10,000 horses which crossed the frontier on February 1, 1871. France had, after the conclusion of the war, to pay about eleven million francs for the maintenance of this army in Switzerland during the rest of the war.

Oppenheim, vol. 2, p. 415.

If the frontiers of the neutral State march with those of the territory where the War is being waged, its Government must take care to occupy its own frontiers in sufficient strength to prevent any portions of the belligerent Armies stepping across it with the object of marching through or of recovering after a Battle, or of withdrawing from War captivity. Every member of the belligerent Army

who trespasses upon the territory of the neutral State is to be disarmed and to be put out of action till the end of the War. If whole detachments step across, they must likewise be dealt with. They are, indeed, not prisoners of War, but, nevertheless, are to be prevented from returning to the seat of War. A discharge before the end of the War would presuppose a particular arrangement of all parties concerned.

If a convention to cross over is concluded, then, according to the prevalent usages of War, a copy of the conditions is to be sent to the Victor. If the troops passing through are taking with them prisoners of War, then these are to be treated in like fashion. Obviously, the neutral State can later demand compensation for the maintenance and care of the troops who have crossed over, or it can keep back War material as a provisional payment. Material which is liable to be spoilt, or the keeping of which would be disproportionately costly, as, for example, a considerable number of horses, can be sold, and the net proceeds set off against the cost of internment.

German War Book, pp. 189, 191.

It is the business of the neutral State to prevent troops crossing over in order to reassemble in the chosen asylum, reform, and sally out to a new attack.

German War Book, p. 197.

Articles 11 and 12, Hague Convention V, 1907, are substantially identical with sections 238, 239 respectively, Austro-Hungarian Manual, 1913.

**Applies to troops of a faction engaged in civil war.**

*Ex parte Tascano et. al.*, 208 Fed. Rep. 938.—The petitioners in this case were members of the so-called Federalist forces in Mexico, and on April 13, 1913, they were defeated by the so-called Constitutionalist forces, and to avoid capture, fled with their arms to United States territory, voluntarily surrendered themselves to the armed forces of the United States and were disarmed and interned.

The Court held: "First, that the petitioners are completely within the provisions of Chapter 2, art. 11, of the Hague Treaty; second, that said article violates no provision of the constitution of the United States, requires no legislation to render it effective; and is accordingly the law of the land; and third, that the President has full authority, and it was and is his duty to enforce said treaty provisions."



RIGHTS AND DUTIES OF NEUTRAL WITH RESPECT TO PRISONERS OF WAR ON ITS  
TERRITORY.

**A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence.**

**The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power.—*Hague Convention V, 1907, Article 13.***

For the application of the modern postliminy is quite different from that of the Roman. \* \* \* It is true, indeed, that a prisoner of war escaping from a vessel in a neutral port, is protected against recapture by this right, as he would be among the Romans. But two nations might, if they pleased, agree to give up such escaped captives; and that this is not done may be best explained on the ground that the laws of one country do not extend into the territory of another, and especially that the laws of a war in which I have no part, ought not to affect my friend or subject within my borders,—the principle in short which makes express conventions of extradition necessary.

Woolsey, pp. 249, 250.

The jurisdiction of a sovereign being exclusive, upon him necessarily depends the liberty of the person and the ownership of property within his dominions. If any one is retained in captivity there, he is identified with the act; and therefore, as it has always been held, with obvious reason, that it is a continuation of hostilities to bring prisoners of war into neutral territory, its sovereign cannot allow subjects of a state with which he is in amity to remain deprived of their freedom in places under his control. If they touch his soil they cease to be prisoners. An exception from this general rule is made in the case of prisoners on board a commissioned ship of a belligerent power, since the act of retaining them in custody falls under the head of acts beginning and ending on board the ship, and not taking effect externally to her, and is therefore one in respect of which a ship of war, under its established privileges, is independent of the jurisdiction of a foreign state within the waters of which it may be.

Hall, p. 641.

Prisoners who escape to neutral territory, and prisoners who are brought by troops taking refuge there, are to be left at liberty; but if the neutral power allows them to remain, it may assign them a place of residence.

Lawrence, p. 401.

The principle that prisoners of war regain their liberty by coming into neutral territory has been generally recognized for centuries. An illustration occurred in 1558, when several Turkish and Barbary captives escaped from one of the galleys of the Spanish Armada, which was wrecked near Calais, and, although the Spanish Ambassador claimed them, France considered them to be freed by the fact of their coming on her territory, and sent them to Constantinople.

Oppenheim, vol. 2, p. 411.

Neutral territory is an asylum to prisoners of war of either belligerent in so far as they become free *ipso facto* by their coming into neutral territory. And it matters not in which way they come there, whether they escape from a place of detention and take refuge on neutral territory, or whether they are brought as prisoners into such territory by enemy troops who themselves take refuge there.

Oppenheim, vol. 2, p. 410-412.

But has the neutral on whose territory a prisoner has taken refuge the duty to retain such fugitives and thereby prevent them from rejoining the enemy army? Formerly this question was not settled. \* \* \* There was likewise no unanimity regarding prisoners brought into neutral territory by enemy forces taking refuge there \* \* \*. Article 13 of Convention V. settles the controversy by enacting that a neutral who receives prisoners of war who have escaped or who are brought there by troops of the enemy taking refuge on neutral territory, shall leave them at liberty, but that, if he allows them to remain on his territory, he *may*—he need not!—assign them a place of residence so as to prevent them from rejoining their forces. Since, therefore, everything is left to the discretion of the neutral, he will have to take into account the merits and needs of every case and to take such steps as he thinks adequate. But so much is certain that a belligerent may not in every case categorically demand from a neutral who receives escaped prisoners, or such as have been brought there by troops who take refuge, that he should detain them.

Oppenheim, vol. 2, p. 411-412.

Article 13, Hague Convention V, 1907, is substantially identical with section 240, Austro-Hungarian Manual, 1913.

RIGHTS AND DUTIES OF NEUTRAL WITH RESPECT TO BELLIGERENTS' SICK AND  
WOUNDED ON ITS TERRITORY.

**A neutral Power may authorize the passage into its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel or war material. In such a case, the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose.**

**The sick or wounded brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral Power so as to ensure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.—Hague Convention V, 1907, Article 14.**

A neutral State may authorize the passage through its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither combatants nor war material. In such a case, the neutral State is bound to adopt such measures of safety and control as may be necessary for the purpose.

Wounded and sick brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral State, so as to insure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

Hague Convention II, 1899, Article 59.

The neutral State may authorize the transport across its territory of the wounded and sick belonging to the belligerent armies, provided that the trains which convey them do not carry either the *personnel* or *material* of war.

Project of Brussels Conference, 1874, Article LV.

Evacuations of wounded and sick not prisoners may pass through neutral territory, provided the personnel and material accompanying them are exclusively sanitary. The neutral State through whose territory these evacuations are made is bound to take whatever measure of safety and control are necessary to secure the strict observance of the above conditions.

Institute, 1880, p. 41.

**Contra.**

After the battle of Sedan, the victorious army was embarrassed by masses of wounded, whom it was difficult to move into Germany by the routes which were open, and whose support in France in part diverted the commissariat from its normal function of feeding the active army. The German government therefore applied to Belgium for leave to transport the wounded across that country by railway. In consequence of the strong protest of France, Belgium, after consultation with the English government, rejected the application. It is indeed difficult to see, apart from the grant of direct aid or of permission to move a corps d'armée from the Rhine Provinces into France, in what way Belgium could have more distinctly abandoned her neutrality than by relieving the railway from Nancy to the frontier from encumbrances, by enabling the Germans to devote their transport solely to warlike uses, and by freeing the commissariat from the burden of several thousand men lodged in a place of difficult access.

Hall, p. 625, 626.

But it [Hague Convention V of 1907] allows under strict condition a passage over neutral territory to the sick and wounded of belligerent armies.

Lawrence, p. 622.

By the stipulation of article 14 it is left to the consideration of a neutral whether or no he will allow the passage of wounded and sick to a belligerent; he will, therefore, have to investigate every case and come to a conclusion according to its merits.

Oppenheim, vol. 2, p. 393.

**Contra, to some extent.**

The passage of wounded soldiers is different from that of troops. If a neutral allows the passage of wounded soldiers, he certainly does not render direct assistance to the belligerent concerned. But it may well be that indirectly it is of assistance on account of the fact that a belligerent, thereby relieved from transport of his wounded, can now use the lines of communication for the transport of troops, war material, and provisions. Thus, when in 1870 after the battles of Sedan, and Metz, Germany applied to Belgium and Luxemburg to allow her wounded to be sent through their territories, France protested on the ground that the relief thereby created to the lines of communication in the hands of the Germans would be an assistance to the military operations of the Germany Army. Belgium, on the advice of Great Britain, did not grant the request made by Germany, but Luxemburg granted it.

Oppenheim, vol. 2, p. 392-393.

The neutral State may allow the passage or transport of wounded or sick through its territory without thereby violating its neutrality; it has, however, to watch that hospital trains do not carry with them either war personnel or war material with the exception of that which is necessary for the care of the sick.

German War Book, p. 195.

Article 14, Hague Convention V, 1907, is substantially identical with section 241, Austro-Hungarian Manual, 1913.

GENEVA CONVENTION.

**The Geneva Convention applies to sick and wounded interned in neutral territory.**

Article 15, Hague Convention V, 1907.

**International Red Cross (Geneva) Convention, 1906.**

CHAPTER I.—*The sick and wounded.*

ARTICLE 1. Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are.

A belligerent, however, when compelled to leave his wounded in the hands of his adversary, shall leave with them, so far as military conditions permit, a portion of the personnel and materiel of his sanitary service to assist in caring for them.

ART. 2. Subject to the care that must be taken of them under the preceding article, the sick and wounded of an army who fall into the power of the other belligerent become prisoners of war, and the general rules of international law in respect to prisoners become applicable to them.

The belligerents remain free, however, to mutually agree upon such clauses, by way of exception or favor, in relation to the wounded or sick as they may deem proper. They shall especially have authority to agree:

1. To mutually return the sick and wounded left on the field of battle after an engagement.

2. To send back to their own country the sick and wounded who have recovered, or who are in a condition to be transported and whom they do not desire to retain as prisoners.

3. To send the sick and wounded of the enemy to a neutral state, with the consent of the latter and on condition that it shall charge itself with their internment until the close of hostilities.

ART. 3. After every engagement the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and to protect the wounded and dead from robbery and ill treatment.

He will see that a careful examination is made of the bodies of the dead prior to their interment or incineration.

ART. 4. As soon as possible each belligerent shall forward to the authorities of their country or army the marks or military papers of identification found upon the bodies of the dead, together with a list of names of the sick and wounded taken in charge by him.

Belligerents will keep each other mutually advised of internments and transfers, together with admissions to hospitals and deaths which

occur among the sick and wounded in their hands. They will collect all objects of personal use, valuables, letters, etc., which are found upon the field of battle, or have been left by the sick or wounded who have died in sanitary formations or other establishments, for transmission to persons in interest through the authorities of their own country.

ART. 5. Military authority may make an appeal to the charitable zeal of the inhabitants to receive and, under its supervision, to care for the sick and wounded of the armies, granting to persons responding to such appeals special protection and certain immunities.

## CHAPTER II.—*Sanitary formations and establishments.*

ART. 6. Mobile sanitary formations (*i. e.*, those which are intended to accompany armies in the field) and the fixed establishments belonging to the sanitary service shall be protected and respected by belligerents.

ART. 7. The protection due to sanitary formations and establishments ceases if they are used to commit acts injurious to the enemy.

ART. 8. A sanitary formation or establishment shall not be deprived of the protection accorded by article 6 by the fact:

1. That the personnel of a formation or establishment is armed and uses its arms in self-defense or in defense of its sick and wounded.

2. That in the absence of armed hospital attendants, the formation is guarded by an armed detachment or by sentinels acting under competent orders.

3. That arms or cartridges, taken from the wounded and not yet turned over to the proper authorities, are found in the formation or establishment.

## CHAPTER III.—*Personnel.*

ART. 9. The personnel charged exclusively with the removal, transportation, and treatment of the sick and wounded, as well as with the administration of sanitary formations and establishments, and the chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war.

These provisions apply to the guards of sanitary formations and establishments in the case provided for in section 2 of article 8.

ART. 10. The personnel of volunteer aid societies, duly recognized and authorized by their own governments, who are employed in the sanitary formations and establishments of armies, are assimilated to the personnel contemplated in the preceding article, upon condition that the said personnel shall be subject to military laws and regulations.

Each state shall make known to the other, either in time of peace or at the opening, or during the progress of hostilities, and in any case before actual employment, the names of the societies which it has authorized to render assistance, under its responsibility, in the official sanitary service of its armies.

ART. 11. A recognized society of a neutral state can only lend the services of its sanitary personnel and formations to a belligerent

with the prior consent of its own government and the authority of such belligerent. The belligerent who has accepted such assistance is required to notify the enemy before making any use thereof.

ART. 12. Persons described in articles 9, 10, and 11 will continue in the exercise of their functions, under the direction of the enemy, after they have fallen into his power.

When their assistance is no longer indispensable they will be sent back to their army or country, within such period and by such route as may accord with military necessity. They will carry with them such effects, instruments, arms, and horses as are their private property.

ART. 13. While they remain in his power, the enemy will secure to the personnel mentioned in article 9 the same pay and allowances to which persons of the same grade in his own army are entitled.

#### CHAPTER IV.—*Matériel.*

ART. 14. If mobile sanitary formations fall into the power of the enemy, they shall retain their matériel, including the teams, whatever may be the means of transportation and the conducting personnel. Competent military authority, however, shall have the right to employ it in caring for the sick and wounded. The restitution of the matériel shall take place in accordance with the conditions prescribed for the sanitary personnel, and, as far as possible, at the same time.

ART. 15. Buildings and matériel pertaining to fixed establishments shall remain subject to the laws of war, but can not be diverted from their use so long as they are necessary for the sick and wounded. Commanders of troops engaged in operations, however, may use them, in case of important military necessity, if, before such use, the sick and wounded who are in them have been provided for.

ART. 16. The matériel of aid societies admitted to the benefits of this convention, in conformity to the conditions therein established, is regarded as private property and, as such, will be respected under all circumstances, save that it is subject to the recognized right of requisition by belligerents in conformity to the laws and usages of war.

#### CHAPTER V.—*Convoys of evacuation.*

ART. 17. Convoys of evacuation shall be treated as mobile sanitary formations subject to the following special provisions:

1. A belligerent intercepting a convoy may, if required by military necessity, break up such convoy, charging himself with the care of the sick and wounded whom it contains.

2. In this case the obligation to return the sanitary personnel, as provided for in article 12, shall be extended to include the entire military personnel employed, under competent orders, in the transportation and protection of the convoy.

The obligation to return the sanitary matériel, as provided for in article 14, shall apply to railway trains and vessels intended for interior navigation which have been especially equipped for evacuation purposes, as well as to the ordinary vehicles, trains, and vessels which belong to the sanitary service.

Military vehicles, with their teams, other than those belonging to the sanitary service, may be captured.

The civil personnel and the various means of transportation obtained by requisition, including railway matériel and vessels utilized for convoys, are subject to the general rules of international law.

#### CHAPTER VI.—*Distinctive emblem.*

ART. 18. Out of respect to Switzerland the heraldic emblem of the red cross on a white ground, formed by the reversal of the federal colors, is continued as the emblem and distinctive sign of the sanitary service of armies.

ART. 19. This emblem appears on flags and brassards as well as upon all matériel appertaining to the sanitary service, with the permission of the competent military authority.

ART. 20. The personnel protected in virtue of the first paragraph of article 9, and articles 10 and 11, will wear attached to the left arm a brassard bearing a red cross on a white ground, which will be issued and stamped by competent military authority, and accompanied by a certificate of identity in the case of persons attached to the sanitary service of armies who do not have military uniform.

ART. 21. The distinctive flag of the convention can only be displayed over the sanitary formations and establishments which the convention provides shall be respected, and with the consent of the military authorities. It shall be accompanied by the national flag of the belligerent to whose service the formation or establishment is attached.

Sanitary formations which have fallen into the power of the enemy, however, shall fly no other flag than that of the Red Cross so long as they continue in that situation.

ART. 22. The sanitary formations of neutral countries which, under the conditions set forth in article 11, have been authorized to render their services, shall fly, with the flag of the convention, the national flag of the belligerent to which they are attached. The provisions of the second paragraph of the preceding article are applicable to them.

ART. 23. The emblem of the red cross on a white ground and the words *Red Cross* or *Geneva Cross* may only be used, whether in time of peace or war, to protect or designate sanitary formations and establishments, the personnel and matériel protected by the convention.

#### CHAPTER VII.—*Application and execution of the convention.*

ART. 24. The provisions of the present convention are obligatory only on the contracting powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent powers should not be signatory to the convention.

ART. 25. It shall be the duty of the commanders in chief of the belligerent armies to provide for the details of execution of the foregoing articles, as well as for unforeseen cases, in accordance with the instructions of their respective governments, and conformably to the general principles of this convention.



ART. 26. The signatory governments shall take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this convention and to make them known to the people at large.

### CHAPTER VIII.—*Repression of abuses and infractions.*

ART. 27. The signatory powers whose legislation may not now be adequate engage to take or recommend to their legislatures such measures as may be necessary to prevent the use, by private persons or by societies other than those upon which this convention confers the right thereto, of the emblem or name of the Red Cross or Geneva Cross, particularly for commercial purposes by means of trade-marks or commercial labels.

The prohibition of the use of the emblem or name in question shall take effect from the time set in each act of legislation, and at the latest five years after this convention goes into effect. After such going into effect, it shall be unlawful to use a trade-mark or commercial label contrary to such prohibition.

ART. 28. In the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present convention.

They will communicate to each other through the Swiss Federal Council the measures taken with a view to such repression, not later than five years from the ratification of the present convention.

### *General provisions.*

ART. 29. The present convention shall be ratified as soon as possible. The ratifications will be deposited at Berne.

A record of the deposit of each act of ratification shall be prepared, of which a duly certified copy shall be sent, through diplomatic channels, to each of the contracting powers.

ART. 30. The present convention shall become operative, as to each power, six months after the date of deposit of its ratification.

ART. 31. The present convention, when duly ratified, shall supersede the Convention of August 22, 1864, in the relations between the contracting states.

The Convention of 1864 remains in force in the relations between the parties who signed it but who may not also ratify the present convention.

ART. 32. The present convention may, until December 31, proximo, be signed by the powers represented at the conference which opened at Geneva on June 11, 1906, as well as by the powers not represented at the conference who have signed the Convention of 1864.

Such of these powers as shall not have signed the present convention on or before December 31, 1906, will remain at liberty to accede to it after that date. They shall signify their adherence in a written

notification addressed to the Swiss Federal Council, and communicated to all the contracting powers by the said Council.

Other powers may request to adhere in the same manner, but their request shall only be effective if, within the period of one year from its notification to the Federal Council, such Council has not been advised of any opposition on the part of any of the contracting powers.

ART. 33. Each of the contracting parties shall have the right to denounce the present convention. This denunciation shall only become operative one year after a notification in writing shall have been made to the Swiss Federal Council, which shall forthwith communicate such notification to all the other contracting parties.

This denunciation shall only become operative in respect to the power which has given it.

In faith whereof the plenipotentiaries have signed the present convention and affixed their seals thereto.

Done at Geneva, the sixth day of July, one thousand nine hundred and six, in a single copy, which shall remain in the archives of the Swiss Confederation and certified copies of which shall be delivered to the contracting parties through diplomatic channels.

**(Here follow the signatures.)**

Article 15, Hague Convention V, 1907, is substantially identical with section 242, Austro-Hungarian Manual, 1913.

#### WHO ARE NEUTRAL PERSONS.

**The nationals of a State which is not taking part in the war are considered as neutrals.**—*Hague Convention V, 1907, Article 16.*

Merchants, masters, and owners of ships, seamen, people of all sorts, ships and vessels, and in general all merchandizes and effects of one of the allies or their subjects, shall not be subject to any embargo, nor detained in any of the countries, territories, islands, cities, towns, ports, rivers, or domains whatever, of the other ally, on account of any military expedition, or any public or private purpose whatever, by seizure, by force, or by any such manner; much less shall it be lawful for the subjects of one of the parties to seize or take anything by force from the subjects of the other party, without the consent of the owner. This, however, is not to be understood to comprehend seizures, detentions, and arrests, made by order and by the authority of justice, and according to the ordinary course for debts or faults of the subject, for which process shall be had in the way of right according to the forms of justice.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, Article XVII.

The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but they shall be liable to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempted from the said service.

No higher impost, under whatever names, shall be exacted from the citizens of one of the two countries, residing or established in the other, then shall be levied upon citizens of the country in which they reside, nor any contribution whatsoever to which the latter shall not be liable.

In case of war, or of expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside with respect to indemnities for damages they may have sustained.

Convention of Friendship, Commerce and Extradition, concluded between the United States and Switzerland, November 25, 1850. Article II.

The citizens of the United States residing in the Republic of Costa Rica, and the citizens of the Republic of Costa Rica residing in the United States, shall be exempted from all compulsory military service whatsoever, either by sea or by land, and from all forced loans or military exactions or requisitions; and they shall not be compelled, under any pretext whatsoever, to pay other ordinary charges, requisi-

tions, or taxes greater than those that are paid by native citizens of the contracting parties respectively.

Treaty of Friendship, Commerce and Navigation, concluded between the United States and Costa Rica, July 10, 1851, Article IX.

The citizens of the United States residing in the Argentine Confederation, and the citizens of the Argentine Confederation residing in the United States, shall be exempted from all compulsory military service whatsoever, whether by sea or by land, and from all forced loans, requisitions or military exactions; and they shall not be compelled, under any pretext whatever, to pay any ordinary charges, requisitions or taxes, greater than those that are paid by native citizens of the contracting parties respectively.

Treaty of Friendship, Commerce and Navigation concluded between the United States and the Argentine Republic, July 27, 1853, Article X.

The Citizens of the United States residing in the Republic of Honduras, and the citizens of the Republic of Honduras residing in the United States, shall be exempted from all compulsory military service whatsoever, either by sea or by land, and from all forced loans or military exactions or requisitions, and they shall not be compelled, under any pretext whatsoever, to pay other ordinary charges, requisitions, or taxes greater than those that are paid by native citizens of the contracting parties respectively.

Treaty of Friendship, Commerce and Navigation, concluded between the United States and Honduras, July 4, 1864, Article IX.

Citizens of the United States in Serbia and Serbian subjects in the United States shall be reciprocally exempted from all personal service, whether in the army by land or by sea; whether in the national guard or militia; from billeting; from all contributions, whether pecuniary or in kind, destined as a compensation for personal service; from all forced loans, and from all military exactions or requisitions. The liabilities, however, arising out of the possession of real property and for military loans and requisitions to which all the natives might be called upon to contribute as proprietors of real property or as farmers, shall be excepted.

Convention of Commerce and Navigation concluded between the United States and Serbia, October 14, 1881, Article IV.

All citizens of the United States residing in the Tonga Islands, and Tongan subjects residing in the United States, shall be exempted from all compulsory military service whether by sea or land, and from all forced loans, military requisitions and quartering of troops. They shall, moreover, not be compelled to pay any other or higher taxes or license fees, or personal dues of any kind, than are or may be paid by the citizens or subjects of the High Contracting Party levying the same.

Treaty of Amity, Commerce and Navigation concluded between the United States and Tonga, October 2, 1886, Article IX.

The citizens or subjects of each of the High Contracting Parties shall be exempt in the territories of the other from all compulsory military service, by land or sea, and from all pecuniary contributions in lieu of such, as well as from all obligatory official functions whatsoever.

Furthermore, their vessels or effects shall not be liable to any seizure or detention for any public use without a sufficient compensation, which, if practicable, shall be agreed upon in advance.

Treaty of Friendship and General Relations, concluded between the United States and Spain, July 3, 1902, Article V.

#### **Right of angary.**

The right of angary shall be abolished, both in time of peace and in time of war, where neutral ships are concerned.

Institute, 1898, p. 154.

#### **Exception.**

It becomes important, in a maritime war, to determine with precision what relations and circumstances will impress a hostile character upon persons and property; and the modern international law of the commercial world is replete with refined and complicated distinctions on this subject. It is settled that there may be a hostile character merely as to commercial purposes, and hostility may attach only to the person as a temporary enemy, or it may attach only to property of a particular description. This hostile character, in a commercial view, or one limited to certain intents and purposes only, will attach in consequence of having possessions in the territory of the enemy, or by maintaining a commercial establishment there, or by a personal residence, or by particular modes of traffic, as by sailing under the enemy's flag or passport. This hostile relation, growing out of particular circumstances, assumes as valid the distinction which has been taken between a permanent and a temporary alien enemy. A man is said to be permanently an alien enemy when he owes a permanent allegiance to the adverse belligerent, and his hostility is commensurate in point of time with his country's quarrel. But he who does not owe a permanent allegiance to the enemy is an enemy only during the existence and continuance of certain circumstances.

Kent, vol. 1, p. 82.

#### **Exception.**

If a person has a settlement in a hostile country by the maintenance of a commercial establishment there, he will be considered a hostile character, and a subject of the enemy's country, in regard to his commercial transactions connected with that establishment. The position is a clear one, that if a person goes into a foreign country, and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a subject for all civil purposes, whether that country be hostile or neutral; and he cannot be permitted to retain the privileges of a neutral character, during his residence and occupation in an enemy's country. \* \* \*

This same principle, that, for all commercial purposes, the domicile of the party, without reference to the place of birth, becomes the test of national character, has been repeatedly and explicitly admitted in the courts of the United States. If he resides in a belligerent country, his property is liable to capture as enemy's property, and if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade. He takes the

advantages and disadvantages, whatever they may be, of the country of his residence. The doctrine is founded on the principles of national law, and accords with the reason and practice of all civilized nations. *Migrans jura amittat ac privilegia et immunitates domicilii prioris.* A person is not, however, permitted to acquire a neutral domicile that will protect such a trade in opposition to the belligerent claims of his native country, if he emigrate from that country *flagrante bello*. Vattel denies explicitly the right of emigration in a war in which his country is involved. It would be a criminal act. This doctrine is considered as settled in the United States.

Kent, vol. 1, pp. 83, 84.

#### Residence as affecting commercial domicile.

It has been a question admitting of much discussion and difficulty, arising from the complicated character of commercial speculations, what state of facts constitutes a residence so as to change or fix the commercial character of the party. The *animus manendi* appears to have been the point to be settled. The presumption, arising from actual residence in any place, is, that the party is there *animo manendi*, and it lies upon him to remove the presumption, if it should be requisite for his safety. If the intention to establish a permanent residence be ascertained, the recency of the establishment, though it may have been for a day only, is immaterial. If there be no such intention, and the residence be involuntary or constrained, then a residence, however long, does not change the original character of the party, or give him a new and hostile one. But the circumstances requisite to establish the domicile are flexible, and easily accommodated to the real truth and equity of the case. Thus it requires fewer circumstances to constitute domicile in the case of a native subject, who returns to reassume his original character, than it does to impress the national character on a stranger. The *quo animo* is, in each case, the real subject of inquiry; and when the residence exists freely, without force or restraint, it is usually held to be complete, whether it be an actual or only an implied residence.

When the residence is once fixed, and has communicated a national character to the party, it is not divested by a periodical absence, or even by occasional visits to his native country. Nor is it invariably necessary that the residence be personal, in order to impress a person with a national character. The general rule undoubtedly is, that a neutral merchant may trade in the ordinary manner to the country of a belligerent, by means of a stationed agent there, and yet not contract the character of a domiciled person. But if the principal be trading, not on the ordinary footing of a foreign merchant, but as a privileged trader of the enemy, such a privileged trade puts him on the same ground with their own subjects, and he would be considered as sufficiently invested with the national character by the residence of his agent. \* \* \*

A national character, acquired by residence, may be thrown off at pleasure by a return to the native country. It is an adventitious character, and ceases by non-residence, or when the party puts himself in motion *bonâ fide*, to quit the country *sine animo revertendi*; and such an intention is essential, in order to enable the party to reassume his native character.

Kent, vol. 1, pp. 85-87.

**Exception.**

National character may be acquired in consideration of the traffic in which the party is concerned. If a person connects himself with a house of trade in the enemy's country, in time of war, or continues during a war a connection formed in a time of peace, he cannot protect himself by having his domicile in a neutral country. He is considered as impressed with a hostile character in reference to so much of his commerce as may be connected with that establishment. The rule is the same, whether he maintains that establishment as a partner or as a sole trader. The Supreme Court of the United States, referring to the English prize cases on this subject, observed, that they considered the rule to be inflexibly settled, and that they were not at liberty to depart from it, whatever doubt might have been entertained if the case was entirely new.

But though a belligerent has a right to consider as enemies all persons who reside in a hostile country, or maintain commercial establishments there, whether they be by birth neutrals, or allies, or fellow-subjects, yet the rule is accompanied with this equitable qualification, that they are enemies *sub modo* only, or in reference to so much of their property as is connected with that residence or establishment. This nice and subtle distinction allows a merchant to act in two characters, so as to protect his property connected with his house in a neutral country, and to subject to seizure and forfeiture his effects belonging to the establishment in the belligerent country. So there may be a partnership between two persons, the one residing in a neutral, and the other in a belligerent country, and the trade of one of them with the enemy will be held lawful, and that of the other unlawful, and consequently the share of one partner in the joint traffic will be condemned, while that of the other will be restored. This distinction has been frequently sustained, notwithstanding the difficulties that may attend the discrimination between the innocent and the noxious trade, and the rule has been introduced into the maritime law of this country.

Kent, vol. 1. pp. 88, 89.

**Exception.**

Whatever may be the extent of the claims of a man's native country upon his political allegiance, there can be no doubt that the natural-born subject of one country may become the citizen of another, in time of peace, for the purposes of trade, and may become entitled to all the commercial privileges attached to his required domicile. On the other hand, if war breaks out between his adopted country and his native country, or any other, his property becomes liable to reprisals in the same manner as the effects of those who owe a permanent allegiance to the enemy State.

As to what species of residence constitutes such a domicile as will render the party liable to reprisals, the text writers are deficient in definitions and details. Their defects are supplied by the precedents furnished by the British prize courts, which, if they have not applied the principle with undue severity in the case of neutrals, have certainly not mitigated it in its application to that of British subjects "resident in the enemy's country on the commencement of hostilities.

In the judgment of the Lords of Appeal in Prize Causes, upon the cases arising out of the capture of St. Eustatius by Admiral Rodney,

delivered in 1785, by Lord Camden, he stated that "if a man went into a foreign country upon a visit, to travel for health, to settle a particular business, or the like, he thought it would be hard to seize upon his goods; but a residence, not attended with these circumstances, ought to be considered as a permanent residence." In applying the evidence and the law to the resident foreigners in St. Eustatius, he said, that "in every point of view, they ought to be considered resident subjects. Their persons, their lives, their industry, were employed for the benefit of the State under whose protection they lived; and, if war broke out, they, continuing to reside there, paid their proportion of taxes, imposts, and the like, equally with natural-born subjects, and no doubt come within that description."

Dana's Wheaton, p. 405.

#### Exception.

The national character of merchants residing in Europe and America is derived from that of the country in which they reside. In the eastern parts of the world, European persons, trading under the shelter and protection of the factories founded there, take their national character from the association under which they live and carry on their trade: this distinction arises from the nature and habits of the countries. In the western part of the world, alien merchants mix in the society of the natives; access and intermixture are permitted, and they become incorporated to nearly the full extent. But in the East, from almost the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the nation; they continue strangers and sojourners, as all their fathers were. Thus, with respect to establishments in Turkey, the British courts of prize, during war with Holland, determined that a merchant, carrying on trade at Smyrna, under the protection of the Dutch consul, was to be considered a Dutchman, and condemned his property throughout the East.

Dana's Wheaton, pp. 418.

#### Exception.

In general, the national character of a person, as neutral or enemy, is determined by that of his domicil; but the property of a person may acquire a hostile character, independently of his national character, derived from personal residence. Thus the property of a house of trade established in the enemy's country is considered liable to capture and condemnation as prize. This rule does not apply to cases arising at the commencement of a war, in reference to persons who, during peace, had habitually carried on trade in the enemy's country, though not resident there, and are therefore entitled to time to withdraw from that commerce. But if a person enters into a house of trade in the enemy's country, or continues that connection during the war, he cannot protect himself by mere residence in a neutral country.

The converse of this rule of the British Prize Courts, which has also been adopted by those of America, is not extended to the case of a merchant residing in a hostile country, and having a share in a house of trade in a neutral country. Residence in a neutral country will not protect his share in a house established in the enemy's coun-



try, though residence in the enemy's country will condemn his share in a house established in a neutral country. It is impossible not to see, in this want of reciprocity, strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adapted to encourage its naval exertions.

Dana's Wheaton, p. 419.

#### Exception.

The produce of an enemy's colony, or other territory, is to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or wherever may be his place of residence.

Dana's Wheaton, p. 420.

#### Effect of martial law.

Like a declaration of a siege or blockade the power of the officer who makes it [a declaration of martial law] is to be presumed until disavowed, and neutrals, who attempt to act in derogation of that authority, do so at their peril.

Halleck, p. 380.

#### Exception.

The national character of a merchant is determined by his *commercial domicile*, and not by the country to which his allegiance is due, either by his birth, or by his subsequent naturalization or adoption. He is regarded as a political member of the nation into which, by his residence and business, he is incorporated, and as a subject of the Government which protects him in his pursuits, and to the support of which he contributes by his property and his industry. This rule of decision is adopted both in prize courts and in courts of common law, and is applied, in a belligerent country, to its own native subjects, as well as to those of a neutral power. Thus, a citizen of the United States who is settled abroad, during a war to which his government is a party, is, with respect to his property and trade, subject to all the disabilities of an alien enemy, or entitled to all the privileges of a neutral, according to the hostile or neutral character of the country in which he has fixed his domicile.

Halleck, pp. 701, 702.

#### Exception.

If a neutral merchant go into an enemy's country during the war merely to collect his debts, or to withdraw the property which he may have there, his temporary residence, *for that purpose alone*, will not confer upon him a hostile character, and the property and funds thus sought to be withdrawn will not be subject to confiscation. But he must bring himself clearly within the rule, for, if instead of confining himself to the legitimate object of his visit, he engages in a trade purely national, his character with respect to such trade is regarded as hostile, and the property embarked in it, if captured, is condemned. It is contended by some that a neutral merchant residing in the enemy's country at the commencement of the war, should have the same privilege of withdrawing his prop-

erty, and that for a reasonable time, it should be exempt from capture. But this doctrine has not been established by the positive adjudication of any court of prize.

Halleck, p. 714.

#### Exception.

The nationality of individuals in war depends not on their origin or their naturalization, but upon their domicil. He is a neutral who is domiciled of free choice in a neutral country, and he an enemy who is domiciled in an enemy's country. Hence—

As domicil can be easily shaken off, a person in the prospect of war, or on its breaking out, may withdraw from the enemy's to another country with the intention of staying there, and thus change his domicil. If he should return to his native country, fewer circumstances would be required to make out intention than if he betook himself to a foreign territory. If against his will and by violence at the breaking out of war he was detained in the belligerent country, [a fact of which he should try to obtain proof by application for a pass,] his longer stay would be regarded as the forced residence of a stranger, and probably all disadvantageous legal consequences of his domicil there would cease.

If a country is conquered during a war, its national character changes, although it may be restored again at peace, and so the nationality and liabilities of its inhabitants engaged in business change.

Woolsey, p. 296, 297.

#### Exception.

But a person having a house of commerce in the enemy's country, although actually resident in a neutral country, is treated as an enemy so far forth as that part of his business is concerned, or is domiciled there *quo ad hoc*. On the other hand, a person having a house of commerce in a neutral country and domiciled among the enemy, is not held to be a neutral. This is the doctrine of the English courts, adopted by the American. "It is impossible," says Dr. Wheaton ("Elements," iv. 1, Sec. 20), "in this not to see strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code, framed by judicial legislation in a belligerent country, and adopted to encourage its naval exertions."

In general, property follows the character of its owner. Thus neutral ships are ships owned by neutrals, that is by persons domiciled in a neutral country, and the same is true of goods. Hence in partnerships, if one owner is a neutral and in a neutral country and the other an enemy, only the property of the latter is liable to capture.

Woolsey, p. 297.

#### Exception.

If a neutral is the owner of soil in a hostile country, the product of such soil, exported by him and captured, is considered hostile. This is on the principle that the owner of soil identifies himself, so far forth, with the interests of the country where his estate lies.

Woolsey, p. 298.

### Exception.

In a revolted province waging regular war there are no loyal persons whose property is distinguished from that of the other inhabitants, but all are jurally enemies, unless detained by force within the borders when desirous to escape. The Supreme Court of the United States (Black's Reports, ii., 635-639) decided that "all persons residing within this (i. e., the Confederate) territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners." Such a decision presupposes hostile territory and not hostile persons only; and the territory could be hostile, only because the existing supreme power was hostile to the United States.

Woolsey, p. 298.

During the contest in Mexico between the constitutional government of President Juarez at Vera Cruz, and the Miramon government occupying the capital, the Government of the United States sent a naval force to the Mexican coast for the protection of the persons and property of American citizens. On March 4, 1860, while the forces of General Miramon were besieging Vera Cruz, Captain Jarvis, of the U. S. S. *Savannah*, in command of the United States naval forces, directed Commander Turner, of the U. S. S. *Saratoga*, to visit General Miramon and ascertain his intentions touching the persons and property of American citizens in Vera Cruz in the event of his taking the city. Commander Turner accordingly called upon General Miramon at the latter's headquarters near Vera Cruz. In response to Commander Turner's inquiries, General Miramon stated that he should respect the persons and property of all foreigners and afford them all the protection which it was in his power to give. Commander Turner then said that, having received this assurance, he was further instructed to say that in the event of an attack upon or of the capture of the city, Captain Jarvis would cause the flag of the United States to be hoisted at the flagstaff of each house covering American citizens and property, in order that they might, as far as possible, be preserved from danger and damage by bombardment and the occupants receive that respect on the part of the troops which General Miramon had expressed his intention to pay. General Miramon signified his concurrence in this arrangement, stating that he should bear it in mind, and expressed the hope that it would be effectual in preserving American citizens and property from injury.

Moore's Digest, vol. vii, p. 196; Report of Commander Turner, Mar. 4, 1860, S. Ex. Doc. 29, 36 Cong., 1 sess., 4.

In July, 1898, when the invasion of Porto Rico by the American forces was expected, the captain-general of the island, upon the petition of the foreign consuls, recognized in writing the neutrality of a point selected outside the city of San Juan, where the foreign residents took refuge. On the Government of the United States being advised of this arrangement, the Secretary of War telegraphed to the commander of the American forces as far as practicable to recognize it.

Moore's Digest, vol. vii, p. 196; For. Rel. 1898, pp. 799, 800.

**Exception.**

As a state possesses jurisdiction, within the limits which have been indicated, over the persons and property of foreigners found upon its land and waters, the persons and property of neutral individuals in a belligerent state are in principle subjected to such exceptional measures of jurisdiction and to such exceptional taxation and seizure for the use of the state as the existence of hostilities may render necessary, provided that no further burden is placed upon foreigners than is imposed upon subjects.

Hall, p. 764.

**Limitation.**

\* \* \* as neutral individuals within an enemy state are subject to the jurisdiction of that enemy and are so far intimately associated with him that they can not be separated from him for many purposes, they and their property are as a general principle exposed to the same extent as non-combatant enemy subjects to the consequences of hostilities. Neutral persons are placed in the same way as subjects of the state under the temporary jurisdiction of the foreign occupant, acts of disobedience are punishable in like manner, and the belligerent is not obliged, taking them as a body, to show more consideration to them in the conduct of his operations than he exhibits towards other inhabitants of the country—he need not, for example, give them an opportunity of withdrawing from a besieged town before bombardment, which he does not accord to the population at large. Their property is not exempt from contributions and requisitions.

To a certain extent however, which is not easily definable, neutral persons taken as individuals are in a more favourable position, relatively to an occupying belligerent, than are the members of the population with which they are mixed. As subjects of a friendly state, it is to be presumed until the contrary is shown that they are not personally hostile; as such subjects, living in a country under the government of the belligerent, they are entitled to the advantages of his protection and of the justice which he administers to his natural subjects, so far as the circumstances of war will allow. Hence he ought to extend to them such indulgences as may be practicable, and he is not justified in subjecting them to penalties on those light grounds of suspicion, which often suffice for him, perhaps inevitably, in his dealings with enemies.

Hall, pp. 764, 765.

**Right of angary.**

The general principle that neutral property in belligerent territory shares the liabilities of property belonging to subjects of the state is clear and indisputable; and no objection can be made to its effect upon property which is associated either permanently or for a considerable time with the belligerent territory. But it might perhaps have been expected, and it might certainly have been hoped, that its application would not have been extended to neutral property passing within a belligerent state. The right to use, or even when necessary to destroy, such property is however recognized by writers, under the name of the right of angary; its exercise is

guarded against in a certain number of treaties; and when not so guarded against, it has occasionally been put in practice in recent times with the acquiescence of neutral states. In a large number of treaties the neutral owner is to some extent protected from loss by a stipulation that he shall be compensated; and it is possible that a right to compensation might be generally held to exist apart from treaties.

The most recent cases of the exercise of the right of angary occurred during the Franco-German War of 1870-1. The German authorities in Alsace, for example, seized for military use between six and seven hundred railway carriages belonging to the Central Swiss Railway, and a considerable quantity of Austrian rolling stock, and appear to have kept the carriages, trucks, &c. so seized for some time. Another instance which occurred nearly at the same moment attracted a good deal of attention, and is of interest as showing distinct acquiescence on the part of the government of the neutral subjects affected. Some English vessels were seized by the German general in command at Rouen, and sunk in the Seine at Duclair in order to prevent French gun-boats from running up the river, and thus barring the German corps operating on its two banks from communication with each other. The German commanders appear to have endeavored in the first instance to make an agreement with the captains of the vessels to sink the latter after payment of their value and after taking out their cargoes. The captains having refused to enter into any such agreement, their refusal was by a strange perversion of ideas 'considered to be an infraction of neutrality,' and the vessels were sunk by the unnecessarily violent method of firing upon them while some at least of the members of the crew appear to have been on board. The English government did not dispute the right of the Germans to act in a general sense in the manner which they had adopted, and notwithstanding the objectionable details of their conduct, it confined itself to a demand that the persons whose property had been destroyed should receive the compensation to which a despatch of Count Bismarck had already admitted their right. Count Bismarck on his side, in writing upon the matter, claimed that 'the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usage'; but he evidently felt that the violence of the methods adopted needed a special justification, for he went on to say, 'the report shows that a pressing danger was at hand, and every other means of meeting it was wanting; the case was therefore one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible under the reservation of indemnification.'

Hall, pp. 765-767.

#### Limitation.

On the question of principle whether the persons and property of the subjects of neutral states, so far as they may be found within enemy territory, are exposed to the violence of war equally with the persons and property of enemy subjects, there is no doubt that as a general rule they are so exposed. Neutral subjects have no claim to be allowed to leave a besieged place, except perhaps diplomats when military necessity does not oppose, and neutral residents have to fur-

nish their share to money contributions. With regard to requisitions of things or services, an invader can rarely have much time for drawing distinctions, but if he had the time he would probably choose to take what he wanted from enemy rather than from neutral subjects, without prejudice to his right to take it from the latter in case of need without incurring greater liability than he would incur towards the former. These are the chances which neutral individuals and companies residing or carrying on business in a foreign country must run, for themselves and for all property which they possess in that country in connection with such residence or business, whether the residence amounts to domicile or not. They increase the strength and wealth of that country, and to protect them against the consequences of an invasion of it would be an intolerable task for their own governments.

Westlake, vol. 2. p. 131.

#### Right of angary.

The invader's right as to neutral property is sometimes spoken of as one of angary, a name given to the right of a prince to impress neutral ships lying in his ports at the outbreak of war. The conditions of modern naval war are such that that right cannot now be often useful, though it was once of considerable importance, but it seems still to exist in case of real necessity, and its exercise would certainly be subject to the duty of compensation.

Westlake, vol. 2, p. 134.

#### Limitation.

It has further to be mentioned in connection with the subject of the present chapter that the Hague Conference of 1907 embodied in its Final Act the two following earnest desires (*vœux*).

2. The conference expresses the earnest desire that in case of war the competent authorities, civil and military, should make it a special duty to ensure and protect the maintenance of pacific relations, and notably of the commercial and industrial relations between the populations of the belligerent states and neutral countries.

3. The conference expresses the earnest desire that the powers should regulate by special treaties the situation, as regards military charges, of foreigners established in their territories.

Since the object of an invasion is to cripple the invaded state, and the commercial and industrial relations between its inhabitants and neutral states are an important means of preventing its being crippled, it does not seem likely that invaders will exchange the practice of hindering those relations for that of fostering them. But the second of the above *vœux* is a very proper one, and will be understood when it is remembered that several Spanish-American states, led by the great immigration into them to claim the children of immigrants as subjects by reason of their birth on the soil, have been engaged in controversies with European powers who have considered that the principle of nationality by parentage ought to exempt such children from military service.

Westlake, vol. 2, pp. 134, 135.

#### Exception.

Another class possessing the enemy character in some degree is composed of

## PERSONS LIVING IN AN ENEMY COUNTRY.

But though they must be reckoned as enemies, they are not hostile to such an extent that they may be slain, or even made prisoners, as long as they live quietly and take no part in the conflict, direct or indirect. When two civilized states are at war the residents in the territory of each will almost invariably include a considerable number of neutral subjects, and sometimes a few enemy subjects as well. These people must of necessity increase the resources of the country by the taxes they pay, and the growth of wealth due to any trading operations they may carry on successfully. It seems to follow that should the district they live in be invaded by the other belligerent, he is at liberty to impose on them, as well as on the subjects of his enemy, such burdens as may be lawfully exacted from districts under military occupation. These include the payment of contributions and requisitions, and the performance of certain personal services, but exclude plunder and personal injury.

But here we are encountered by the modern doctrine that nationality rather than domicile should determine personal status, including hostile or friendly character and in consequence liability or non-liability to the severities of warfare. At the Hague Conference of 1907 Germany attempted to introduce rules founded on this theory into the Convention on the Rights and Duties of Neutrals in Land Warfare. She desired to exempt neutral subjects resident in occupied districts from requisitions and other exactions. Belligerents were not to accept assistance from neutral individuals unless it was humanitarian in its character, and neutral governments were to forbid their subjects to render prohibited services. The United States supported the German propositions; but a strong group of powers, headed by Great Britain, France, Japan, and Russia opposed them successfully. For the present, therefore, the old doctrine that status depends on domicile holds good as far as military occupation is concerned. It has, however, to struggle for existence in this field as elsewhere. That the plenipotentiaries assembled at The Hague did not regard its results as altogether satisfactory may be inferred from the wish expressed unanimously in their Final Act, "that the Powers should regulate, by special treaties, the position, as regards military charges, of foreigners residing within their territories."

Hitherto we have considered the case of residents in the enemy's territory in so far as they are affected by war on land. We must now deal with their position as regards war at sea. The national character of ships is determined by the flag they are entitled to fly; but when cargoes are seized in circumstances that justify the capture of enemy property yet give no right to confiscate the property of neutrals, the question immediately arises whether the owners are to be regarded as enemies if they reside in enemy territory or as neutrals if in addition they possess neutral nationality. Should they be both residents on enemy soil and subjects of the enemy state, no other position than that of enemies can by any possibility be assigned to them. But if residence points in one direction and national character in another, which is to prevail? The answer of the school of thought dominant on the continent of Europe is short and simple. It adheres to nationality as the test. But the English-speaking powers have adopted the opposite view. British and American judges have laboriously built up a great body of law, based upon the proposition

that such a residence in an enemy's country as adds the resources of the individual to the common stock of strength for war possessed by the hostile state, stamps the enemy character upon him. They have applied the principles of the law of domicile to questions of maritime capture, and in doing so have modified them to some extent in order to secure substantial justice for all concerned. It would be difficult to deny that they have succeeded in their endeavor, and equally difficult to maintain that the rules they have elaborated are distinguished by the simplicity that characterizes the opposing doctrine. We shall give the outline of their system a little further on. Here it will be sufficient to repeat that its essence is the adoption of residence, understood in a special sense, as the test of hostile or friendly character.

The conflict between the two views, which may be called for shortness the British and the Continental, was brought out at the Naval Conference of 1908-1909. One of the matters submitted to that distinguished body of representatives from the chief maritime states of the world was this very question of national character. It was agreed on all hands that vessels were, generally speaking, to be regarded as belonging to the country whose flag they were entitled to fly. And no great difficulty was experienced in reaching the unanimous conclusion that "the neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner." But the division of opinion as to the proper method of determining the character of the owner was so marked and persistent that no decision was possible. The matter was left open, and in all probability it will be settled in the end by the proposed International Prize Court. A compromise was suggested on the lines of the adoption of nationality as the usual test, and the substitution for it of domicile in the exceptional cases when the owner either had no nationality or was of double nationality, companies to be considered as enemy or neutral according to the locality of their headquarters. This seems reasonable; but it failed to command unanimity, and had to be abandoned in consequence.

Lawrence. pp. 371-374.

Our next class of enemies is tainted with the hostile character to a very small degree only according to the theory of domicile, and not at all according to the theory of nationality. It consists of

#### PERSONS LIVING IN PLACES HELD BY THE ENEMY MERELY AS MILITARY OCCUPANT.

These a state may regard as enemies to the extent of subjecting to hostile capture their property proceeding from the places in question, even though they are parts of its own territory. Being under enemy occupation, their possession enriches the enemy for the time being and contributes to his warlike resources, while their own country reaps no advantage from them. They are, therefore, liable, while the occupation lasts, to the severities exercised in war against the property of non-combatant subjects of the enemy state. But if the hostile occupants are dispossessed, the inhabitants are, of course, treated as citizens and not as residents in enemy territory. During the Civil War in the United States the courts regarded places in the



firm possession of the Southern Confederacy as enemy territory, and the property of persons domiciled therein, as enemy property in so far as the rules of warlike capture were concerned. But it should be remembered that there are British decisions that point to cession or completed conquest, rather than mere occupation in the military sense, as necessary before the territory can be considered hostile to such an extent as to justify the capture and condemnation of property proceeding from it.

Lawrence, pp. 374, 375.

#### Exception.

Lastly, if domicile be taken as the test, the enemy character is possessed in an appreciable degree, as far as property is concerned, by

NEUTRAL SUBJECTS WHO HAVE HOUSES OF TRADE IN THE ENEMY'S COUNTRY, THOUGH THEY DO NOT RESIDE THERE.

They are said to have acquired in this way a trade domicile in war which is quite independent of their personal residence, and exposes the goods connected with it to the risk of capture, on the principle that the enemy country has its resources for war increased by the trade done in it, even though the trader himself is a neutral subject and lives in neutral territory. The result was tersely put by Lord Stowell in the case of the *Vigilantia*, when he referred with approval to the rule "that if a person entered into a house of trade in the enemy's country in time of war, or continued that connection during the war, he could not protect himself by mere residence in a neutral country." The liability to capture does not, however, extend to other goods belonging to the same owner but unconnected with the hostile trading establishment.

Lawrence, pp. 375, 376; 1 C. Rob. 15.

#### Exception.

According to British and American practice, domicile modifies to a great extent the rules based on nationality. It is necessary, therefore, to inquire what kind of residence amounts in law to domicile, and how far liability to the severities of war is affected thereby. Fortunately there are in existence a number of decisions on these points by great prize court judges both in England and in the United States, and we are able to gather from them a body of clear and consistent doctrine. Domicile is determined by the intent of the parties and by the length of their residence. If the intent to go to a certain place and live there is perfectly clear, a domicile therein is acquired as soon as residence commences. If the intent is not clear, long-continued residence will create a domicile; and an intent to make a short stay in a place and then return is held to be overridden by remaining there a long time and treating the place as a home. In every case where a man is a citizen of one country and has his home in another, the liability of his property connected with the latter country to capture and other incidents of warfare is determined by domicile and not by nationality. If the country of his domicile be neutral, he has a neutral character in so far as his prop-

erty connected with that country is concerned; if it be belligerent, he has a belligerent character which renders his property connected with it enemy property to the other belligerent. But any property which he may possess in the country of his citizenship and allegiance follows the condition of that country as neutral or belligerent. And further, for purposes of capture at sea in time of war, a man may have two or more domiciles, one at least of which is unconnected with actual residence; for he may live in one country and have a house of trade, or a share as partner in a house of trade, in another country, or in several other countries. In such a case goods connected with any house of trade in an enemy country would be regarded as enemy goods, and held liable to capture in circumstances that justify the seizure of such property.

The effect of intent in creating a domicile of choice was stated by Lord Camden in his judgment on the case of the non-Dutch subjects who were found by Admiral Rodney in the island of St. Eustatius when the British took it from the Dutch in 1781. With regard to those who meant to remain there, he laid down that "they ought to be considered resident subjects" of the republic of the United Netherlands; and he applied this rule to the case of Mr. Whitehill, a natural-born British subject, who had arrived in the island only a few hours before the British fleet attacked it, but was shown to have intended to take up his permanent residence therein.

Lawrence, pp. 376. 377.

#### Exception—Produce of enemy soil.

The last kind of enemy property to be considered may be defined as

THE PRODUCE OF ESTATES OWNED BY NEUTRALS IN BELLIGERENT TERRITORY OR IN PLACES IN THE MILITARY OCCUPATION OF THE ENEMY, AS LONG AS IT REMAINS THE PROPERTY OF THE OWNER OF THE SOIL.

Such property is regarded as enemy property according to what we may term the British and American view, even though the neutral owners reside in their own neutral country. The point was fully discussed and decided by the Supreme Court of the United States in the case of the *Thirty Hogsheads of Sugar*, which occurred in the war of 1812-1814. An American privateer captured a cargo of sugar proceeding in a British vessel from the Danish island of Santa Cruz to a commercial house in London at the risk of its owner, the proprietor of the estate whence it came. Denmark was an ally of France, and Great Britain was at one and the same time engaged in waging war on them and carrying on a separate war on different grounds with the United States. In the course of her war with Denmark she had captured the island of Santa Cruz and held it under her belligerent occupation. Denmark was neutral in the war between Great Britain and the United States; and the proprietor of the sugar, Adrian Benjamin Bentzon, was a Danish subject who had left Santa Cruz and was living in Denmark. But the Supreme Court condemned the sugar on the ground that it was the produce of a place that must be considered for purposes of war as belligerent territory, and was when captured the property of the owner of that place.

Lawrence, p. 384; 9 Cranch, 195.

The general rule with regard to individuals is that subjects of the belligerents bear enemy character, whereas subjects of neutral States do not.

Oppenheim, vol. 2, p. 108.

\* \* \* according to the French conception foreigners residing in enemy country do not acquire enemy character, \* \* \* This French conception of enemy character dates from the judgment of the *Conseil des Prises* in the case of *Le Hardy contre La Voltigeante* (1802), which laid down the rule that neutral subjects residing in enemy country do not lose their neutral character, and enemy subjects residing in neutral countries do not lose their enemy character.

Oppenheim, vol. 2, p. 111; 1 Pistoye et Duverdy, 321.

Since Great Britain has entered a reservation against articles 16, 17, and 18 of Convention V. she is not bound by them. It is, however, of importance to state that articles 16, 17, and 18 (a)—not 18 (b)!—enact only such rules as were always customarily recognised, *unless such an interpretation is to be put upon article 16 as prevents a belligerent from considering subjects of neutral States inhabiting the enemy country as bearing enemy character.*

Oppenheim, vol. 2, p. 109 (note).

#### Exception.

From the time when International Law made its appearance down to our own no difference has been made by a belligerent in the treatment accorded to subjects of the enemy and subjects of neutral States inhabiting the enemy country. Thus Grotius (III. c. 4, Secs. 6 and 7) teaches that foreigners must share the fate of the population living on enemy territory, and Bynkershoek distinctly teaches that foreigners residing in enemy country bear enemy character. English and American practice assert, therefore, that foreigners, whether subjects of the belligerents or of neutral States, acquire enemy character by being domiciled (i. e. resident) in enemy country, because they have thereby identified themselves with the enemy population and contribute, by paying taxes and the like, to the support of the enemy Government. For this reason, all measures which may legitimately be taken against the civil population of the enemy territory, may likewise be taken against them, unless they withdraw from the country or are expelled therefrom. It must, however, be remembered that they acquire enemy character *in a sense and to a certain degree* only, for their enemy character is not as intensive as that of enemy subjects resident on enemy territory. Such of them as are subjects of neutral States do not, therefore, lose the protection of their home State against arbitrary treatment inconsistent with the laws of war; and such of them as are subjects of the other belligerent are handed over to the protection of the Embassy of a neutral Power. However that may be, they are not exempt from requisitions and contributions; from the restrictions which an occupant imposes upon the population in the interest of the safety of his troops and his military operations; from punishments for hostile acts committed against the occupant; or from being taken into captivity, if exceptionally necessary.

This treatment of foreigners resident on occupied enemy territory is generally recognised as legitimate by theory and practice. The proposal of Germany, made at the Second Peace Conference, to agree upon rules which would have stipulated a more favourable treatment of subjects of neutral States resident on occupied enemy territory was, therefore, rejected. Not even France supported the German proposals, although according to the French conception foreigners residing in enemy country do not acquire enemy character, and therefore the German proposals were only a logical consequence of the French conception. This French conception of enemy character dates from the judgment of the *Conseil des Prises* in the case of *Le Hardy contre La Voltigeante* (1802), which laid down the rule that neutral subjects residing in enemy country do not lose their neutral character, and enemy subjects residing in neutral countries do not lose their enemy character. But it must be emphasised that this French conception of enemy character has been developed, not with regard to the treatment of foreigners whom an occupant finds resident on occupied enemy territory, but with regard to the exercise of the right of capture of enemy vessels and goods in warfare at sea. France did not make an attempt to draw the logical consequences from this conception and, therefore, to mete out to foreigners resident on occupied enemy territory a treatment different from that of enemy subjects resident there.

Since enemy subjects who reside in neutral countries, or are allowed to remain resident on the territory of the other belligerent, have to a great extent identified themselves with the local population and are not under the territorial supremacy of the enemy, they lose their enemy character according to English and American practice, but according to French practice they do not, a difference of practice which bears upon many points, especially upon the character of goods.

Oppenheim, vol. 2, pp. 110-112.

It was held by the United States Attorney General in 1899 that property of a neutral permanently situated within the territory of the enemy, is, from the situation, liable to damage from the lawful operations of war, and that no compensation is due for such damage.

The claim under consideration was that of British subjects on account of the cutting of the cable at *Manila* by United States forces, during the war with Spain and it was held that there was no ground to support the claim.

22 Op. Atty. Gen., 315.

#### Exception.

Martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

Lieber, sec. 7.

#### Exception.

All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from this law. They

may communicate with foreign parts, or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

Lieber, sec. 98.

#### **Exception.**

Any person is an Enemy, for the purposes of this Chapter, irrespectively of his Nationality, who resides and carries on trade in the Enemy's Territory.

A place only in temporary occupation by the Enemy is not necessarily to be considered as Enemy's Territory.

Conversely, no person, although of Enemy Nationality, who resides and carries on trade in British, Allied, or Neutral Territory is an Enemy.

The place where a person resides and trades is sometimes described as that of his "Commercial Domicil."

Trading in a country, without residence there, may confer a "Commercial Domicil" in that country.

So also may residence in the Enemy's Territory on the part of a person engaged in trade in a Neutral country.

A person may have different Commercial Domicils, according to the course of different transactions.

The Commercial Domicil of a Consul who trades is in the place of his Trade, not in the country which he represents.

The Commercial Domicil of European traders in the East is that of the factory or association under whose protection they carry on their trade.

A Commercial Domicil is retained till another is *bonâ fide* acquired, but is more readily changed than a domicil properly so called.

A person engaged in enemy navigation is also an Enemy, for the purposes of this Chapter, not only in respect of the particular Vessel in which he is employed, but also in respect of other Vessels belonging to him that have no distinct national character impressed upon them.

The Commercial Domicil of the Owner of a Vessel will be ascertained from her Papers—e. g., her Register (if any), or the Builder's Contract, if the Vessel is a new one; or the Bill of Sale, if the Vessel has been lately transferred; or from inquiry from the Master, who is bound to be acquainted with the name and Commercial Domicil of the Owner.

Holland, pp. 10-11.

#### **Right of angary.**

If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed on in advance with the owner or master of the vessel. Due regard must be had to treaty-stipulations upon these matters.

U. S. Naval War Code, 1900, Article 6.

**Exception.**

As regards the civil population of a fortified place the rule is: All the inhabitants, whether natives or foreigners, whether permanent or temporary residents, are to be treated alike.

No exception need be made in regard to the diplomatists of neutral States who happen to be in the town; if before or during the investment by the besieger their attention is drawn to the fate to which they expose themselves by remaining, and if days of grace in which to leave are afforded them, that simply rests on the courtesy of the besieger. No such duty is incumbent upon him in international law. Also permission to send out couriers with diplomatic despatches depends entirely upon the discretion of the besieger. In any case it will always depend on whether the necessary security against misuse is provided.

German War Book, pp. 105, 106.

**Exception.**

In consequence there are permitted:

1. Requisitions of houses and their furniture for the purpose of billeting troops.

2. Use of houses and their furniture for the care of the sick and wounded.

3. Use of buildings for observation, shelter, defense, fortification, and the like.

Whether the property owners are subjects of the occupied territory or of a Foreign State is a matter of complete indifference.

German War Book, p. 163.

The property of a neutral State, as also that of its citizens, is, even if it lies within the seat of war, to be respected so far as the necessity of war allows.

German War Book, p. 198.

**Right of angary.**

It [the property of a neutral State or of its citizens] can obviously be attacked and even destroyed in certain circumstances by the belligerents, but only if complete compensation be afterwards made to the injured owners. Thus—to make this clear by an example from the year 1870—the capture and sinking of six English colliers at Duclaix was both justified and necessary on military grounds, but it was, for all that, a violent violation of English property, for which on the English side compensation was demanded, and on the German side was readily forthcoming.

German War Book, p. 198.

Article 16, Hague Convention V, 1907, is substantially identical with section 243, Austro-Hungarian Manual, 1913.

**Exception.**

*The "Two Brothers," 1 C. Rob., 131.*—In this case the Court said of an American claimant residing in France: "If a man goes into a belligerent country and remains there four years, employing himself and his property in *French* trade, it will not be easy to take him out of the description of a merchant of that country, as to his property so employed."

**Exception.**

*The "Harmony," 2 C. Rob., 322.*—In this case it was held that the fact that an American citizen had resided in France for six years was enough to establish a French domicile, since the length of time is the essential element in such questions and may cause a general residence to grow out of a special purpose.

**Revival of national character.**

*"Indian Chief," 3 C. Rob., 12.*—This was the case of a ship on a voyage from a Dutch port and belonging to a man who was an American by birth, but who had acquired a commercial domicile in England, which obtained at the time of the sailing of the vessel. However, before the vessel was captured the owner had gone to France, on his way to the United States to reside.

Held that the ship-owner was in the actual pursuit of his American character, which was revived by his departure from England, without intention of returning.

**Ownership of house of trade in enemy country does not affect trade of house in neutral territory.**

*The "Portland," 3 C. Rob., 42.*—This was a case of a neutral who had had a commercial domicile in an enemy's country, with which he claimed to have severed all connection. There was a dispute, however, on this point, but the case in question involved only trading from another house of the claimant, situated in a neutral country.

The court said: "I know of no case, nor of any principle, that could support such a position as this, that a man, having a house of trade in the enemy's country, as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house, as in those which belonged to his belligerent domicile."

**Commercial domicile abroad does not affect goods from house of trade in neutral territory.**

*The "Herman," 4 C. Rob., 228.*—This was a case of seizure for trading with the enemy. The claimant was a neutral subject, who came to London in 1795 and traded there as a member of a firm. In 1796 he left London, retaining an interest in the firm, but started trading on his own account in a neutral city. The captured goods were consigned to the London firm but had been laden for his separate account.

Held that the above facts did not give to the claimant an English character with respect to the captured goods, since it was clear that the shipment did not originate from the London house.

**Exception.**

*The "President," 5 C. Rob., 277.*—In this case an American citizen made a claim as owner of a captured vessel.

The Court said: "The claimant is described to have been for many years settled at the Cape [of Good Hope], with an established house of trade, and as a merchant of that place, and must be taken as a subject of the enemy's country."

**Exception.**

*The "Matchless," 1 Haggard, 97.*—The court said: "Upon such a question it has certainly been laid down by accredited writers on

general law, and upon grounds apparently not unreasonable, that if a merchant expatriates himself as a merchant to carry on the trade of another country, exporting its produce, paying its taxes, employing its people, and expending his spirit, his industry, and his capital in its service, he is to be deemed a merchant of that country, notwithstanding he may, in some respects, be less favored in that country than one of its native subjects. Our own country, which is charged with holding the doctrine of unextinguishable allegiance more tenaciously than others, is no stranger to this rule. Its highest tribunals which adjudicate the national character of property taken in war apply it universally. They privilege persons residing in a neutral country to trade as freely with the enemies of Great Britain in war as the native subject of that neutral country, although our own resident merchants cannot without special permission of the crown."

*The "Ann Green," 1 Gallison, 274.*—In this case it was held that a British subject domiciled in the United States, though temporarily absent in a British island, is as to purposes of trade, an American merchant, but that, if pending a known war between the United States and Great Britain, he makes a shipment to a British port, *in his character as a British subject*, that shipment is affected with a hostile character, if war breaks out during the voyage.

#### Exception.

*The "San José Indiano," 2 Gallison, 268.*—In this case it was held that if there be a house of trade established in the enemy's country, the property of all of the partners in the house is condemnable as prize, notwithstanding some of them have a neutral residence, but that such connection with the house of trade will not affect the other separate property of the partners having a neutral residence.

#### Exception—Produce of enemy soil.

*Benson v. Boyle, 9 Cranch, 191.*—This was a case of seizure of produce raised upon the plantation of a neutral situated on British territory. It appeared that about the time of the seizure the owner of the plantation removed to the United States.

The court sustained the condemnation and said that personal property might follow the owner but that land is fixed, and, wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is situated.

#### Extension of rule.

In the case of *The "Venus," 9 Cranch, 253*, the Court said: "The converse of this rule inevitably applies to the subject of a belligerent state, domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world."

#### Exception.

*The "Antonia Johanna," 1 Wheaton, 159.*—In this case it was held that the share of a partner in a neutral house is, by the laws of war, subject to confiscation, where his own domicile is in a hostile country.

#### Exception.

*Laurent's Case, American and British Claims Commission, 1855. Report of Decisions, p. 120.*—Claimants, who were British subjects



who had resided in Mexico, as merchants, for twenty-five years, presented a claim for money confiscated by the American Commander, during war with Mexico, as the property of the Mexican government.

The Umpire of the Commission decided that, inasmuch as the claimants had long been residents of Mexico, had a fixed home there, with apparently every intention of continuing so to reside, they were for the purposes of the commission, Mexican citizens and not British subjects, and that the Commissioners did not form a tribunal competent to entertain their claims.

**Exception.**

*The "Freundschaft,"* 4 Wheaton, 105.—In this case a seizure had been made of goods shipped by an English firm and claim was made for the exemption of the share of one partner because he had a neutral domicile.

Held, that the neutral domicile of one of the partners will not protect that partner's property from condemnation because the trade of an enemy firm is essentially a hostile trade.

*United States v. Guillem*, 11 How., 47.—In this case it was held that a neutral, who resided in an enemy's country, resumes his neutral rights as soon as he puts himself and his family *in itinere* to return home to reside, and has a right to take with him money he has earned, as the means of support for himself and his family. Such property, it was further held, is not forfeited by a breach of blockade by the vessel on board of which he has taken passage if he personally is in no fault.

**Exception.**

*The "Cheshire,"* 3 Wall., 231.—In this case it was held that the property of a commercial house, established in the enemy's country, is subject to condemnation; though some of the partners have a neutral domicile.

**Exception.**

With respect to cases arising during the American Civil War, the courts of the United States held that all persons, whether foreigners or not, who resided within the territory of the enemy were liable to be regarded as enemies.

*The Prize Cases*, 2 Black, 635; *The Venice*, 2 Wall., 258; *The William Bagaley*, 5 Wall., 377; *The Gray Jacket*, 5 Wall., 342; *The Pioneer*, Blatchf. Prize Cas., 61; *The Prince Leopold*, id., 89; *The Lilla*, 2 Sprague, 177.

**Visiting vessel subject to martial law.**

*United States v. Dieckelman*, 92 U. S., 50.—In this case it was held that a merchant vessel of one country visiting for the purpose of trade, a port of another country where martial law has been established, under belligerent right, subjects herself to that law while she is in such port.

See, to the same effect, Mr. Seward, Secretary of State, to Baron von Gerolt, Prussian minister, October 11, 1862, Moore's Digest, vol. vii, p. 277.

**Withdrawal from commercial domicile abroad, on outbreak of war.**

The English courts hold that a person doing business in a land in which he is not naturalized is allowed, on the outbreak of war, a reasonable time to leave such land and dissolve his business relations.

*The Acrasimo*, 11 Moore, P. C. 88; *The Ariel*, id, 119.

*It seems that the courts of the United States take the same view of the law on this point.*

*The William Bagaley*, 5 Wall., 377; *The Gray Jacket*, id., 342.

#### Exception.

*The "Johanna Emilië," Spinks Prize Cases, 12.*—The court said: "There is no principle, I apprehend, so well laid down—no principle so generally followed as this, that whatever country a gentleman may belong to, if he is resident in and carries on trade for a period of time in another country, he must be taken for the purposes of trade, to belong to that other country, and not to his original domicile."

See, to the same effect, *The Abo*, Spinks Prize Cases, 42.

#### Exception.

*The "Aina," I Spinks, A, and E. Rep. 313.*—This was the case of a capture of a Russian vessel, a one-third interest in which was claimed by a neutral, residing in Russia.

Held, that the claimant must be considered as an enemy, since, after the commencement of the war, he had resided in the enemy's country for purposes of trade, and thereby had adhered to the enemy.

#### Acquisition of national character.

*The "Ernest Merck," Spinks Prize Cases, 98.*—The court said: "With respect to the national character of the master,—a Prussian by birth, a Russian by national character up to the 4th of April, 1854,—it may be as well to say a few words on the doctrine so strongly insisted on by the learned counsel for the claimants, and which I think is founded on sound principles. It is this,—that a national character, acquired by occupation only, may be changed with greater facility than a national character arising from birth or from long domicile; but though I admit this to be true, yet I hold that it is also true that a national character, acquired by occupation, must remain until another is *bona fide* acquired. How has such domicile been acquired in the present case? By a residence of two days afterwards, and the payment of a few dollars. It must be observed, moreover, that this was not a return to the national character of origin, but the acquisition of a new national character in a state to which the master was altogether a stranger.

"The master is said to have been naturalized on the 4th of April, to have been made a burgher on the 5th of April, and to have had four shares transferred to him on the 6th of April, on which day, also, the passport is dated; he admits that he was resident in Schwerin for two days, not before, but afterwards; he acquired, therefore, his right, if indeed he acquired any, to a citizenship at Mecklenburg by purchase, and not by residence. If this be a legitimate mode of changing a national character, then such change may take place in twenty-four hours."

#### Acquisition of new national character.

*The "Baltica," Spinks Prize Cases, 264.*—The court said:—"I have considered all the authorities on this subject, and I think the fair result is, with respect to a mercantile national character, that the party becomes clothed with a new character from the period when he first takes steps *animo removendi* to abandon his former domicile, and *animo manendi* to acquire a new one."

HOW NEUTRAL CHARACTER MAY BE LOST—TREATMENT OF OFFENDING PERSON.

**A neutral cannot avail himself of his neutrality:**

- (a) If he commits hostile acts against a belligerent;
- (b) If he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.—*Hague Convention V, 1907, Article 17.*

If the neutral state fail to fulfill the obligations of neutrality, it cannot claim the privileges and exemptions incident to that condition. The rule is equally applicable to the citizens and subjects of a neutral state. So long as they faithfully perform the duties of neutrality, they are entitled to the rights and immunities of that condition. But for every violation of neutral duties, they are liable to the punishment of being treated in their persons or property as public enemies of the offended belligerent.

Halleck, pp. 628–629.

When a person belonging to a neutral state takes permanent civil or military service with a foreign state he identifies himself so fully with it that he becomes the enemy of its enemies for every purpose.

Hall, p. 521.

[If a neutral individual] makes a specific bargain to carry despatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, and he makes himself in effect the enemy of the other belligerent. \* \* \* Hence the belligerent is allowed to protect himself by means analogous to those which he uses in the suppression of contraband trade. He stops the trade by force, and inflicts a penalty on the neutral individual.

Hall, pp. 697, 698.

The position of an individual who leaves his country in order to enter belligerent service is similar, the other belligerent being entitled to treat him as an unprotected enemy. \* \* \*

Westlake, vol. 2, p. 195.

First among those individuals who may be regarded as enemies we must place *persons found in the military or naval service of the*

*enemy state.* These are enemies to the fullest extent. They may be killed or wounded in fair fight according to the laws of war, and, if captured, may be held as prisoners of war. Their nationality makes no difference in this respect. If any of them are neutral subjects, they can claim no immunities on that account. As was definitely stated in the fifth Convention of the last Hague Conference, they are free from special severities, but subject to the ordinary risks and incidents of civilized warfare. Enrolment in the public armed forces of a belligerent puts them as regards the enemy in the same position as their comrades who are subjects of the state for which they are fighting.

Lawrence, pp. 366-367.

There are acts sometimes performed by neutrals which involve an entry for the time being into the service of a belligerent, and the doing for him what is of direct advantage to him in his war. They are not mere commercial ventures, like carrying contraband goods to a neutral market, and therefore the law of contraband does not apply to them. Its *formulae* deal with ships and destinations, goods and cargoes. They can not be made to apply to such acts as the transport of noxious persons and the transmission of warlike intelligence, which are two of the chief of the forbidden services. \* \* \*

Firstly, there is a difference in the character of the acts themselves. What takes place in cases of contraband is done purely as a matter of trade. Its subjects are commodities and its object gain. In un-neutral service the acts are not acts of ordinary commerce. Their predominant attributes are warlike rather than mercantile. It is true that they are generally done for reward; but they involve entering for a time into the service of a belligerent, and doing for him something so helpful in his war that neutrals ought not to do it. What Sir William Scott said in the case of the *Atalanta* of carrying warlike despatches applies equally well to all other forms of the offence we are considering. He who does such things "under the privilege of an ostensibly neutral character does in fact place himself in the service of the enemy state, and is justly to be considered in that character."

Lawrence, pp. 724-725; 4 C. Rob. 440.

\* \* \* neutral individuals can, however, lose their neutral and acquire enemy character in several cases \* \* \* if they enter the armed forces of a belligerent, or if they commit other acts in his favour, or commit hostile acts against a belligerent, they acquire enemy character.

Oppenheim, vol. 2, pp. 108-109.

Since Great Britain has entered a reservation against articles 16, 17, and 18 of Convention V. she is not bound by them. It is, however, of importance to state that articles 16, 17, and \* \* \* enact only such rules as were always customarily recognized.

Oppenheim, vol. 2, p. 109 (note).

All measures that are allowed during war against enemy subjects are likewise allowed against such subjects of neutral Powers as have thus acquired enemy character. For instance, during the late South

African War hundreds of subjects of neutral States, who were fighting in the ranks of the Boers, were captured by Great Britain and retained as prisoners until the end of the struggle. Such individuals must not, however, be more severely treated than enemy subjects, and, in especial, no punitive measures are allowed against them.

Oppenheim, vol. 2, p. 109.

\* \* \* it must be especially observed, that the acts by which subjects of neutral States lose their neutral and acquire enemy character need not necessarily be committed after the outbreak of war. Such individuals can, even before the outbreak of war, identify themselves to such a degree with a foreign State that, with the outbreak of war against that State, enemy character devolves upon them *ipso facto* unless they at once sever their connection with such State. This, for instance, is the case when a foreign subject in time of peace enlists in the armed forces of a State and continues to serve after the outbreak of war.

Oppenheim, vol. 2, p. 110.

Article 17, Hague Convention V, 1907, is substantially identical with section 244, Austro-Hungarian Manual, 1913.

NEUTRAL ACTS NOT CONSTITUTING PARTIALITY TO ONE BELLIGERENT.

The following acts shall not be considered as committed in favour of one belligerent in the sense of Article XVII, letter (b):

- (a) Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories;
- (b) Services rendered in matters of police or civil administration.—*Hague Convention V, 1907, Article 18.*

Contra as to (a).

The next question to be considered, is, whether neutrals may assist a belligerent by money, in the shape of a loan or otherwise, without violating the duties or departing from the position of neutrality? It seems to be universally conceded, that if such loan be made for the manifest purpose of enabling the belligerent to carry on the war, it would be a virtual concurrence in the war, and consequently a just cause of complaint by the opposite party. But Vattel contends that the loaning of money to one belligerent, by the subjects of a neutral state, is not such a breach of neutrality as to be either a cause of war or of complaint, provided the loan is made for the purpose of getting good interest, and not for the purpose of enabling one belligerent to attack the other. Phillimore very properly regards this as a manifest frittering away of the important duties of the neutral; and that it is as much a violation of neutral duty to furnish the one as the other of the "two main nerves, iron and gold," for the equipage and conduct of the war. The English courts have decided that such laws are in violation of international law, and that they will take no notice of, or render any assistance in, any transactions growing out of such loans, unless raised with the special license of the crown.

Halleck, p. 526.

The private person, if the laws of his own state or some special treaty do not forbid, can lend money to the enemy of a state at peace with his own country for purposes of war. [Can sell it arms, ammunition, or any article of war].

Woolsey, p. 280.

Contra as to (b).

When a person belonging to a neutral state takes permanent civil \* \* service with a foreign state he identifies himself so fully with

it that he becomes the enemy of its enemies for every purpose. When he merely contracts to do specific services, he becomes an enemy to the extent, and for the purposes, of those services.

Hall, p. 521.

A modern belligerent no more dreams of complaining because the markets of a neutral nation are open to his enemy for the purchase of money, than because they are open for the purchase of cotton. The reason is obvious. Money is in theory and in fact an article of commerce in the fullest sense of the word.

Hall, p. 620.

Tried therefore by the tests which have been suggested as imposed by the theory of neutrality, loans by neutral individuals to belligerent states must be pronounced legitimate, and such they are in fact held to be. During the Franco-German war of 1870, large parts of the loans contracted by both belligerents were raised without objection in England.

Westlake, vol. 2, p. 252.

Money is a form of merchandise, and neutral subjects may trade in it; though if they send to one belligerent specie or negotiable securities, the cruisers of the other may capture them on their voyage as being contraband of war.

Lawrence, p. 631.

Since relations of peace obtain between either of the belligerents and neutral States, the subjects of the latter can, by way of trade and otherwise, render many kinds of service to either belligerent without thereby losing their neutral character.

Oppenheim, vol. 2, p. 108.

**Contra as to (b).**

Since Great Britain has entered a reservation against articles 16, 17, and 18 of Convention V she is not bound by them. It is, however, of importance to state that articles \* \* \* 17, and 18(a)—not 18 (b)!—enact only such rules as were always customarily recognised, \* \* \*. The matter is different with regard to article 18 (b), which creates an entirely new rule, for nobody has hitherto doubted that the members of the police force and the administrative officials of the enemy bear enemy character whether or no they are subjects of the enemy State.

Oppenheim, vol. 2, p. 109 (note).

**Explanatory as to (b).**

This stipulation must, however, be read with caution. It can only mean that such individuals do not lose their neutral character to a greater degree than other subjects of neutral States resident on enemy territory; it cannot mean that they are in every way to be considered and treated like subjects of neutral States not residing on enemy territory.

Oppenheim, vol. 2, p. 109-110.

Article 18, Hague Convention V, 1907, is substantially identical with section 245, Austro-Hungarian Manual, 1913.

RECIPROCAL TREATMENT, BY NEUTRAL AND BELLIGERENT, OF RAILWAY MATERIAL FROM  
THE TERRITORY OF THE OTHER COUNTRY.

Railway material coming from the territory of neutral Powers, whether it be the property of the said Powers or of Companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin.

A neutral Power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of the belligerent Power.

Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage.—*Hague Convention V, 1907, Article 19.*

The plant of railways coming from neutral States, whether the property of those States, or of companies, or of private persons, shall be sent back to them as soon as possible.

*Hague Convention II, 1899, Article 54.*

The same reasons [why the property of neutral residents are in principle exposed to the violence of war] do not apply to property which may enter a territory in the course of a business carried on elsewhere, and which in the same course would soon leave it again. Such is the rollingstock of a foreign state or railway company, which cannot avoid crossing and recrossing the frontier from time to time, or a ship which enters a port of the territory in the course of the trade of a merchant in a foreign country, to whom she belongs or by whom she is chartered. In such cases the neutral owner has in some measure entrusted his property to the fortunes of the enemy, though not so far as to identify it with him, and the just course is to allow it to be requisitioned for a real military necessity, compensation being paid. In the case of rollingstock the invader may further plead that it takes the place of a corresponding quantity belonging to the railways of the country, which is probably abroad, or that if those railways are worked by the aid of foreign rollingstock in excess of an equal exchange, then the foreign owners who consent to that mode of working are really carrying on business in the country.

Westlake, vol. 2, pp. 131, 132.

It is therefore clear that the return of rolling stock "as soon as possible," which was required by the H LIV of 1899 as well as by



the (19) now before us, was not by the former, any more than by the latter it is now, intended in a wider sense than to prevent its abusive detention, and, by acknowledging the right to its return, to make it the invader's duty to pay compensation for its use and deterioration.

Westlake, vol. 2, p. 132.

\* \* \* in land warfare, when it has hitherto been the custom to lay hands on all the transport within reach without drawing nice distinctions as to its ownership, the practice is now surrounded with the closest restrictions. \* \* \*

Lawrence, p. 628.

The question has been raised as to whether a neutral whose rolling stock runs on the railway lines of a belligerent, may continue to leave such rolling stock there although it is being used for the transport of troops, war material, and the like. The answer, I believe, ought to be in the negative, for there is no doubt that, if the rolling stock remains on the railway lines of a belligerent, the neutral concerned is indirectly rendering transport services to the belligerent.

Oppenheim, vol. 2, p. 433.

That such rolling stock [belonging to private railway companies of a neutral State] may not, without the consent of the companies owning it, be made use of by a belligerent for the transport of troops, war material, and the like, except in the case of and to the extent required by absolute necessity, follows from Article 19 of Convention V. But, if a private railway company gives its consent, and if its rolling stock is made use of for warlike purposes, it acquires enemy character, article 19 of Convention V. does not apply, and the other belligerent may seize and appropriate it as though it were the property of the enemy State.

Oppenheim, vol. 2, p. 434.

Article 19, Hague Convention V, 1907, is substantially identical with section 246, Austro-Hungarian Manual, 1913.

LAYING OF AUTOMATIC CONTACT MINES BY NEUTRALS.

Neutral Powers which lay automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents.

The neutral Power must inform ship-owners, by a notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel.—*Hague Convention VIII, 1907, Article 4.*

A neutral State may lay mines in its territorial waters for the defense of its neutrality. It should, in this case, observe the same rules and take the same precautions as are imposed on belligerents.

The neutral State should inform ship-owners, by a notice issued in advance, where automatic contact mines will be laid. This notice must be communicated at once to the Governments through the diplomatic channel.

The question of the laying of mines in straits is reserved, both as concerns neutrals and belligerents.

At the close of the war the belligerent and neutral States shall do their utmost to remove the mines which they have laid, each Power removing its own mines.

\* \* \* \* \*

The belligerent and neutral States whose duty it is to remove the mines after the war must make known the date at which the removal of the mines is complete.

A violation of one of the preceding rules entails responsibility therefor on the part of the State at fault.

The State which has laid the mine is presumed to be at fault unless the contrary is proved.

An action may be brought against the guilty State, even by individuals, before the competent international tribunal.

Institute, 1911, pp. 167, 168.

It is highly desirable that neutrals should be forbidden to block with mines the straits under their control which are passages between open seas. But should the prohibition apply to all neutral waters? The Convention of 1907 [Hague VIII] answers the question in the negative, stipulating only for the precautions imposed on belligerents and for previous notice to mariners of the places where the mines have been laid. It would be much simpler to declare them illegal in every case. The smaller states regard them as a cheap defence against possible aggression from a strong and unscrupulous bellig-

erent. But their safety and independence really rest on moral considerations, and not on force. Against casual violations of their neutrality by subordinate commanders, torpedoes and submarines would be a more efficient protection than mines, and not vastly more expensive when the cost of possible compensations comes to be reckoned. Neutrals would lose little or nothing in the way of material security if they were denied the right to use mechanical mines in their ports and waters, while the cause of humanity, which is a direct interest of all states, would gain much.

Lawrence, p. 538.

In order to defend themselves against possible violations of their neutral territory, neutrals may lay automatic contact mines off their coasts. \* \* \*

Convention VIII. is quite as unsatisfactory in its rules concerning mines laid by neutrals as in its rules concerning mines laid by belligerents, and the danger to neutral shipping created by mines laid by neutrals is very great, all the more as the laying of mines by neutrals is not restricted to their maritime belt. For article 4 of Convention VIII. speaks of the laying of contact mines on the part of neutral Powers *off their coasts*, without limiting the laying within the three-mile wide maritime belt as was proposed at the Second Peace Conference, and as article 6 of the *Règlementation internationale de l'Usage des Mines sous-marines et torpilles* of the Institute of International Law likewise proposes.

Oppenheim, vol. 2, p. 445.

Article 4, Hague Convention VIII, 1907, is substantially identical with section 68, Austro-Hungarian Manual, 1913.

CARE OF BELLIGERENTS' SICK AND WOUNDED ON NEUTRAL VESSELS—RIGHTS AND  
LIABILITIES OF SUCH VESSELS.

**Belligerents may appeal to the charity of the commanders of neutral merchant-ships, yachts, or boats to take on board and tend the sick and wounded.**

**Vessels responding to this appeal, and also vessels which have of their own accord rescued sick, wounded, or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board, but, apart from special undertakings that have been made to them, they remain liable to capture for any violations of neutrality they may have committed.—*Hague Convention X, 1907, Article 9.***

Neutral merchantmen, yachts, or vessels, having, or taking on board, sick, wounded, or shipwrecked of the belligerents, can not be captured for so doing, but they are liable to capture for any violation of neutrality they may have committed.

*Hague Convention III, 1899, Article 6.*

Merchant vessels, yachts, or neutral vessels that happen to be in the vicinity of active maritime hostilities, may gather up the wounded, sick, or shipwrecked of the belligerents. Such vessels, after this service has been performed, shall report to the belligerent commander controlling the waters thereabouts, for future directions, and while accompanying a belligerent will be, in all cases, under his orders; and if a neutral, be designated by the national flag of that belligerent carried at the foremasthead, with the red cross flag flying immediately under it.

These vessels are subject to capture for any violation of neutrality that they may commit. Any attempt to carry off such wounded, sick, and shipwrecked, without permission, is a violation of neutrality. They are also subject, in general, to the provisions of article 23.

*U. S. Naval War Code, 1900, Article 25.*

Article 9, *Hague Convention X, 1907*, is substantially identical with section 111, *Austro-Hungarian Manual, 1913*.

DEMAND OF BELLIGERENT WAR VESSEL FOR DELIVERY OF SICK AND WOUNDED CARED  
FOR ON HOSPITAL YACHTS OR PRIVATE VESSELS.

Any war-ship belonging to a belligerent may demand that sick, wounded, or shipwrecked men on board military hospital-ships, hospital-ships belonging to relief societies or to private individuals, merchant-ships, yachts, or boats, whatever the nationality of these vessels, should be handed over.—*Hague Convention X, 1907, Article 12.*

Article 83, Institute, 1913 (p. 194), is identical with Article 12, Hague Convention X, 1907.

Neutral merchantmen can either of their own accord have rescued wounded, sick, or shipwrecked men, or they can have taken them on board on appeal by belligerent men-of-war. The surrender of these men may, according to article 12 of Convention X., be demanded at any time by any belligerent man-of-war. But if such demand be not made and the men be brought into a neutral port, they need not be detained by the neutral concerned.

Oppenheim, vol. 2, p. 425.

Article 12, Hague Convention X, 1907, is substantially identical with section 114, Austro-Hungarian Manual, 1913.

On July 15, 1864, referring to the action of the British steam yacht *Deerhound*, in picking up Captain Semmes and other survivors of the *Alabama* and taking them to England, where they were set at liberty, Mr. Seward, Secretary of State, wrote Mr. Adams, Minister to England, as follows: "I freely admit that it is no part of a neutral's duty to assist in making captures for a belligerent, but I maintain it to be equally clear that, so far from being neutrality, it is direct hostility for a stranger to intervene and rescue men who had been cast into the ocean in battle, and then carry them away from under the conqueror's guns."

Moore's Digest, vol. vii, p. 949; Dip. Cor. 1864, II, 218, 219.

INTERNMENT OF SICK, WOUNDED, AND SHIPWRECKED BELLIGERENTS TAKEN ON BOARD  
NEUTRAL WARSHIP.

If sick, wounded, or shipwrecked persons are taken on board a neutral war-ship, every possible precaution must be taken that they do not again take part in the operations of the war.—*Hague Convention X, 1907, Article 13.*

One can hardly admit into this class of neutral obligation [i. e., of abstention] a duty not to rescue drowning crews of a belligerent warship. The question was raised with reference to the action of the British yacht *Deerhound*, when the *Alabama* was sunk by the *Kearsarge* off Cherbourg; and was again discussed with reference to the help rendered to the crew of the *Variag*, when that vessel was destroyed last year in the harbour of Chemulpo. It must doubtless be the duty of the government to which the rescuers belong to see that their charitable interference does not set free the persons benefited by it for continued service in the war.

Neutral Duties in a Maritime War, Holland, Proceedings of the British Academy, II, 3.

At the beginning of the Russo-Japanese War, on February 9, 1904, after the Russian cruisers *Variag* and *Koriets* had accepted the challenge of a Japanese fleet, fought a battle outside the harbour of Chemulpo, and returned, crowded with wounded, to Chemulpo, the British cruiser *Talbot*, the French *Pascal*, and the Italian *Elba* received large numbers of the crews of the disabled Russian cruisers. The Japanese demanded that the neutral ships should give up the rescued men as prisoners of war, but the neutral commanders demurred, and an arrangement was made according to which the rescued men were handed over to the Russians under the condition that they should not take part in hostilities during the war.

Oppenheim, Vol. 2, p. 424.

Article 13, Hague Convention X, 1907, is substantially identical with section 115, Austro-Hungarian Manual, 1913.

INTERMENT OF SICK, WOUNDED, AND SHIPWRECKED BELLIGERENTS LANDED AT  
NEUTRAL PORT—EXPENSES.

The shipwrecked, sick, or wounded, who are landed at a neutral port with the consent of the local authorities, must, unless an arrangement is made to the contrary between the neutral State and the belligerent States, be guarded by the neutral State so as to prevent them again taking part in the operations of the war.

The expenses of tending them in hospital and interning them shall be borne by the State to which the shipwrecked, sick, or wounded persons belong.—*Hague Convention X, 1907, Article 15.*

The neutral State may require an indemnity from the belligerent whose lawfully interned forces or whose sick and wounded it has supported.

Institute, 1898, p. 155.

The shipwrecked, wounded, or sick, who are landed at a neutral port with the consent of the local authorities, shall, unless there exist an agreement to the contrary between the neutral State and the belligerent States, agree that they will not again take part in the operations of war.

The expenses of hospital care and of internment shall be borne by the State to which such shipwrecked, wounded, or sick belong.

U. S. Naval War Code, 1900, Article 29.

Article 15, Hague Convention X, 1907, is substantially identical with section 117, Austro-Hungarian Manual, 1913.

Contra to some extent.

June 19, 1905, the Russian ambassador at Washington inquired whether the hospital ship *Kostroma*, which had been ordered from Shanghai to Manila, would be allowed to take wounded or sick officers and sailors from Admiral Enquist's vessels back to Russia on their giving their paroles to take no further part in the war. A similar inquiry was received from Admiral Train. The matter was on June 20 brought to the attention of the Japanese legation, but on the next day, before its answer was received, the *Kostroma* arrived at Manila, and the President deemed it proper and humane to direct a compliance with the Russian request, upon the officers and men giving their parole, in accordance with the assurance given in the Russian ambassador's note. Meanwhile, the Japanese Govern-

ment instructed its legation to state that it would not object to any disposition which the United States might see fit to make of the subject.

Moore's Digest, vol. vii, p. 994.

July 26, 1905, the Russian Ambassador at Washington asked that Sublieutenant Bertenson, of the *Aurora* [interned at Manila], be allowed to return to Russia, on his parole not to take further part in the war. The request, which appeared to be made as for a favor, was, with the concurrence of the Japanese Government, granted. It soon appeared, however, by a cable from Manila, that Sublieutenant Bertenson was ill, and that Admiral Enquist had asked permission not only for him, but for certain other officers, who also were ill, to return to Russia, their physical condition requiring that they leave the climate of Manila. Permission was, with the concurrence of the Japanese Government, granted for their return to Russia on parole, it appearing by the examination and report of the United States naval authorities at Manila that they were ill. The permission embraced two lieutenants and two sublieutenants.

Moore's Digest, vol. vii, p. 995.



TREATMENT OF NEUTRAL CAPTAIN, OFFICERS, AND CREW OF CAPTURED ENEMY MERCHANT SHIP.

When an enemy merchant-ship is captured by a belligerent, such of its crew as are nationals of a neutral State are not made prisoners of war.

The same rule applies in the case of the captain and officers likewise nationals of a neutral State, if they promise formally in writing not to serve on an enemy ship while the war lasts.

The names of the persons retaining their liberty under the conditions laid down in Article V, paragraph 2, and in Article VI, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

The provisions of the three preceding Articles do not apply to ships taking part in the hostilities.—*Hague Convention XI, 1907, Articles 5, 7, and 8.*

If any citizens or subjects, with their effects, belonging to either party, shall be found on board a prize vessel taken from an enemy by the other party, such citizens or subjects shall be liberated immediately, and their effects so captured shall be restored to their lawful owners, or their agents.

Treaty of Peace and Amity concluded between the United States and Tripoli, June 4, 1805, Article V.

When an enemy ship, public or private, is seized by a belligerent, such of its crew as are nationals of a neutral State, are not made prisoners of war. The same rule applies in the case of the captain and officers likewise nationals of a neutral State, if they promise in writing not to take, during hostilities, any service connected with the operations of the war.

\* \* \* \* \*

The names of the persons retaining their liberty on condition of the promise provided for by the preceding article, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

\* \* \* \* \*

When a public or a private ship has directly or indirectly taken part in the hostilities, the enemy may retain as prisoners of war the whole personnel of the ship, without prejudice to the penalties he might otherwise incur.

Members of the personnel of a public or of a private vessel, who are personally guilty of an act of hostility towards the enemy, may be held by him as prisoners of war, without prejudice to the penalties he might otherwise incur.

Institute, 1913, pp. 189, 190.

The next class of enemies is composed of *seamen navigating the merchant vessels of the enemy state*. They differ from ordinary combatants in that they may not attack the enemy of their own initiative, and from ordinary non-combatants in that they may fight to defend their vessel if it is attacked by the enemy. They, therefore, occupy a position midway between the fighting forces and the civilian population. Till 1907 they might be held as prisoners of war when their vessel was captured, no matter whether they offered resistance or made a quiet surrender. But the Hague Conference of that year, in its Convention relative to certain Restrictions on the Exercise of the Right of Capture in Maritime War, freed them from liability to be kept in captivity, if they would make a formal promise in writing not to undertake during the war any service connected with its operations. Should they be subjects of a neutral state, they must be set at liberty unconditionally, except that officers of neutral nationality are required to promise in writing not to serve again on an enemy ship during the continuance of hostilities. These immunities, which the Japanese largely anticipated in their war of 1904-1905 with Russia, are made to depend on a peaceful delivery of the vessel. Under modern conditions of warfare resistance would in the vast majority of cases amount to madness, and would, therefore, be attempted very rarely. But when made, it would, of course, deprive those who made it of freedom from capture as prisoners of war. Should the crew of a belligerent merchantman make an unprovoked attack on a vessel of the enemy, they would be liable now, as of old, to the severities exercised against non-combatants who perform hostile acts.

Lawrence, pp. 369-370.

All combatants and also all officers and members of the crews of captured merchantmen, could formerly [to Hague Convention XI, 1907] be made prisoners of war.

Oppenheim, vol. 2, p. 250.

**Contra as to crew.**

But when such persons [bona fide foreign subjects] are captured on board rebel vessels, and are serving as officers or crew, they can be treated as prisoners of war and are to be held as such. \* \* \*

Instructions of United States Secretary of the Navy, September 23, 1864.

**Contra.**

The personnel of a merchant vessel of an enemy captured as a prize can be held, at the discretion of the captor, as witnesses, or as prisoners of war when by training or enrollment they are immediately available for the naval service of the enemy; or they may be released from detention or confinement. They are entitled to their personal effects and to such individual property, not contraband of war, as is

not held as part of the vessel, its equipment, or as money, plate, or cargo contained therein.

All passengers not in the service of the enemy, and all women and children on board such vessels should be released and landed at a convenient port, at the first opportunity.

Any person in the naval service of the United States who pillages or maltreats, in any manner, any person found on board a merchant vessel captured as a prize, shall be severely punished.

U. S. Naval War Code, 1900, Article II.

#### **Contra.**

The master of an enemy vessel, and her crew, may be taken prisoners.

Japanese Regulations, 1904, Article 50.

Passengers, and the master and crew of a ship which is not an enemy vessel, must not be taken prisoners. Persons, however, who are considered necessary as witnesses may be forcibly detained.

Japanese Regulations, Article 50.

[Sections 135, 136, French Naval Instructions, 1912, are substantially identical with Article 5, Hague Convention XI, 1907.]

You will deliver to the interested persons a receipt for the promises that they have given in the terms of paragraphs 136 and 137. Moreover, you will take care to acquaint me and cause the enemy to be acquainted, by every possible way, with the names of the individuals left at liberty under the conditions referred to in the above named paragraphs.

French Naval Instructions, sec. 138.

Articles 5 and 7, Hague Convention XI, 1907, are substantially identical with sections 36 and 38 respectively, Austro-Hungarian Manual, 1913.

#### INVIOABILITY OF NEUTRAL WATERS.

**Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.—*Hague Convention XIII, 1907, Article 1.***

Belligerent ships in a neutral port shall keep the peace, obey the orders of the authorities. \* \* \*

Institute, 1898, p. 155.

The neutral State may require an indemnity from the belligerent \* \* \* whose ships have, either inadvertently or by violation of the order of the port, caused expense or damage.

Institute, 1898, p. 155.

Neutral ships admitted into belligerent ports shall submit to all visits necessary to ascertain the character of the personnel and the nature of the goods on board, and to all measures taken in the interest of the safety of the State to which the port belongs. In case of resistance, the execution of these measures may, if necessary, be secured by the use of force.

Institute, 1898, p. 156.

There is, then, no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful.

Dana's Wheaton, p. 524.

Neutral land and neutral territorial waters are sacred. No act of warfare may lawfully take place within them.

Lawrence, p. 608.

#### Exception.

Extreme necessity will justify a temporary violation of neutral territory. But the extremity ought to be very great, and explanation together with any reparation the case may demand ought to be tendered immediately to the aggrieved neutral. It is impossible to lay down beforehand an exact rule for cases the essence of which is that they are beyond rule. The nearest approach to a satisfactory formula is to be found in Mr. Webster's statement in the case of the *Caroline*, that it is necessary "to shew a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." In this case Great Britain finally expressed regret for the absence of any explanation and apology at the time, and the

American government accepted these assurances. The incident may be held to show that temporary violations of neutral territory, resorted to under stress of a great emergency, and limited in point of time and magnitude to the warding off of the danger which caused them, are but technical offences, to be apologised for on the one hand and condoned on the other, but not regarded as serious wrongs for which substantial reparation is due.

Lawrence, pp. 609-610.

You will strictly conform to the prohibitions imposed upon belligerents by Convention XIII of the Hague of October 18, 1907, concerning the rights and duties of neutral Powers in case of naval war.

For the application of this Convention you will consider territorial waters as never extending less than *three* miles from the coast, islands or fringing banks appertaining thereto, counting from low water mark, and never beyond the range of guns.

French Naval Instructions, 1912, secs. 22 and 23.

Article I, Hague Convention XIII, 1907, is substantially identical with section 121, Austro-Hungarian Manual, 1913.

HOSTILE ACTS IN NEUTRAL WATERS FORBIDDEN.

Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.—*Hague Convention XIII, 1907, Article 2.*

If a vessel of either party shall be attacked by an enemy within gunshot of the forts of the other, she shall be defended as much as possible. If she be in port, she shall not be seized or attacked when it is in the power of the other party to protect her; \* \* \*

Treaty of Peace and Amity concluded between the United States and Tripoli, June 4, 1805, Article X.

If any vessel of either of the parties shall have an engagement with a vessel belonging to any of the Christian Powers, within gun-shot of the forts of the other, the vessel so engaged shall be defended and protected as much as possible, until she is in safety.

Treaty of Peace and Friendship, concluded between the United States and Morocco, September 16, 1836, Article X.

The right to take prize cannot be exercised except in the waters of a belligerent and on the high seas; it cannot be exercised in neutral waters nor in waters which are expressly protected from acts of war by treaty. Neither can a belligerent continue within the latter two classes of waters an attack already begun.

Institute, 1882, p. 47.

An attack, begun on the high seas and pursued in a neutral port or roadstead where a ship has taken refuge, is a violation of neutral territory. It must be checked by the territorial power, by the use of force if necessary, and may be grounds for an indemnity.

Institute, 1898, pp. 155, 156.

Belligerent ships in a neutral port shall \* \* \* refrain from all hostilities.

Institute, 1898, p. 155.

1. Straits whose shores belong to different States form part of the territorial sea of the littoral States, which will exercise their sovereignty to the middle line.

2. Straits whose shores belong to the same State and which are indispensable to maritime communication between two or more States other than the littoral State, always form part of the territorial sea of such State, whatever the distance between the coasts.

3. Straits which serve as a passage from one open sea to another open sea can never be closed.

Institute, 1894, p. 115.

#### Definition of territorial waters.

The Institute,

Considering that there is no reason to confound in a single zone the distance necessary for the exercise of sovereignty and for the protection of coastwise fishing and that which is necessary to guarantee the neutrality of nonbelligerents in time of war;

That the distance most generally adopted of three miles from low water mark has been recognized as insufficient for the protection of coastwise fishing;

That this distance moreover does not correspond to the actual range of guns placed on the coast;

Has adopted the following provisions:

Article 1. The State has a right of sovereignty over a zone of the sea washing the coast, subject to the right of innocent passage reserved in Article 5.

This zone bears the name of territorial sea.

Article 2. The territorial sea extends six marine miles (60 to a degree of latitude) from the low water mark along the full extent of the coasts.

Article 3. For bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening toward the sea where the distance between the two sides of the bay is twelve marine miles in width, unless a continued usage of long standing has sanctioned a greater breadth.

Article 4. In case of war a neutral littoral State has the right to fix, by declaration of neutrality or by special notification, its neutral zone beyond six miles up to the range of coast artillery.

Institute, 1894, pp. 113, 114.

The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in territory belonging to no one. Hostilities cannot be lawfully exercised within the territorial jurisdiction of the neutral state which is the common friend of both parties. To grant any such right to one would be a detriment to the other, and to extend the privilege to both would necessarily make the neutral territory the theatre of hostile operations, and involve the state in the consequences of the war. Hence, every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful, and the party so trespassing is liable to be treated as an enemy, unless full satisfaction is made for such violation of neutral rights.

Halleck, p. 517.

The armed cruisers of belligerents, while within the jurisdiction of a neutral state, are bound to abstain from any acts of hostility toward the subjects, vessels, or other property of their enemies; \* \* \* they can employ neither force nor stratagem to recover prizes, or to rescue prisoners in the possession of the enemy; nor can they use a

neutral port, or waters within neutral jurisdiction, either for the purpose of hindering the approach of vessels of any nation whatever, or for the purpose of attacking those which depart from the ports or shores of neutral powers. No proximate acts of war, such as a ship stationing herself within the neutral line, and sending out her boats on hostile enterprises, can, in any manner, be allowed to originate in neutral territory; nor can any measure be taken that will lead to immediate violence.

Halleck, p. 523.

The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory belonging to no one. Hence it follows, that hostilities can not lawfully be exercised within the territorial jurisdiction of the neutral State, which is the common friend of both parties.

Dana's Wheaton, p. 520.

Not only are all captures made by the belligerent cruisers within the limits of this jurisdiction [the maritime territorial jurisdiction of a neutral State] absolutely illegal and void, but captures made by armed vessels stationed in a bay or river, or in the mouth of a river, or in the harbor of a neutral State, for the purpose of exercising the rights of war from this station, are also invalid.

Dana's Wheaton, pp. 520, 521.

#### **Extent of territorial waters.**

When the maritime war commenced in Europe, in 1793, the American government, which had determined to remain neutral, found it necessary to define the extent of the line of territorial protection claimed by the United States on their coasts, for the purpose of giving effect to their neutral rights and duties. It was stated on this occasion, that governments and writers on public law had been much divided in opinion as to the distance from the sea-coast within which a neutral nation might reasonably claim a right to prohibit the exercise of hostilities. The character of the coast of the United States, remarkable in considerable parts of it for admitting no vessel of size to pass near the shore, it was thought would entitle them in reason to as broad a margin of protected navigation as any nation whatever. The government, however, did not propose, at that time, and without amicable communications with the foreign powers interested in that navigation, to fix on the distance to which they might ultimately insist on the right of protection. President Washington gave instructions to the executive officers to consider it as restrained, for the present, to the distance of one sea league, or three geographical miles, from the sea-shores. This distance, it was supposed, could admit of no opposition, being recognized by treaties between the United States, and some of the powers with whom they were connected in commercial intercourse, and not being more extensive than was claimed by any of them on their own coasts. As to the bays and rivers, they had always been considered as portions of the territory, both under the laws of the former colonial government and of the present union, and their immunity from belligerent operations was sanctioned by the general law and usage of nations.

Dana's Wheaton, pp. 529-530.



No cruiser is authorized to chase a vessel within or across neutral waters, and all captures so made, or made in violation of the neutral laws for maintaining neutrality, must be regarded as illegal with respect to the neutral, although not illegal with respect to the enemy.

Woolsey, pp. 282, 283.

It has been already seen that the commission of hostilities within neutral territory was the earliest subject of legal restraint. Their prohibition was so necessary a consequence of the doctrine of sovereignty, and is so undisputed a maxim of law, that it would be superfluous to recur to the subject were it not that aberrations in practice have been more common than in any other matter connected with neutrality in which the rule is so clear. In 1793 the French frigate *Modeste* was captured in the harbour of Genoa by two English men of war; and it was neither restored nor was any apology made for the violation of Genoese neutrality. But in the same year the American government acted upon this law by causing the restoration of the ship *Grange*, seized in Delaware Bay; and the English Courts gave effect to it by voiding a capture which took place within the mouths of the Mississippi.

Hall, p. 626.

Again, in 1863, the *Chesapeake*, a passenger boat plying between New York and Portland, was captured on its voyage by a small number of Confederate partisans, who had embarked at New York. She was pursued by an armed vessel belonging to the United States, which found her and seized her in British waters. Two men only were on board, the rest of the captors having deserted her, but a third prisoner was taken out of an English ship lying alongside. The United States surrendered the vessel and the men, and made an apology for the violation of territory of which its officers had been guilty.

Hall, pp. 644, 645; Dana's Wheaton, Note 209.

That a prize cannot lawfully be made in neutral waters does not depend on whether they were furnished with forts or other means of defence. There were none in the cases before Lord Stowell which have been cited, and in the case of *La Perle*, Portalis observed that it is the neutral territory which must be respected, without regard to its strength, and for its own sake.

Westlake, vol. 2, p. 232; 1 Pistoye et Duverdy 100, Freeman Snow, 398.

#### Exception.

But the prize which is to benefit by the fact that she was taken in neutral waters must not have begun the hostilities, although if attacked there she does not lose her right by defending herself. And she must apply to the neutral authorities for protection, if she has the opportunity to do so before being attacked, and this even although those authorities may have no force at the spot capable of preventing the capture, for it is always possible that an intervention by a civil representative of the neutral state may be effectual.

Westlake, vol. 2, p. 232.

The law of nations defines with a fair amount of clearness the obligations of belligerent states in their dealings with those of their neighbors who remain neutral in the contest. The first and most important of their duties in this connection *is to refrain from carrying on hostilities within neutral territory*. We have already seen that, though this obligation was recognized in theory during the infancy of International Law, it was often very imperfectly observed in practice. But in modern times it has been strictly enforced, and any state which knowingly ordered warlike operations to be carried on in neutral territory, or refused to disavow and make reparation for such acts when committed by its subordinates on their own initiative, would bring down upon itself the reprobation of civilized mankind. \* \* \* Even when cruisers have begun the chase of an enemy vessel on the high seas, they may not follow it into neutral waters, and there complete the capture.

Lawrence, pp. 608-609.

On the occasion of a complaint by the British Government that a cruiser of the United States had captured a vessel in British waters, Mr. Seward, by direction of the President, addressed a note to the Secretary of the Navy, of Aug. 8, 1862, giving strict instructions to be communicated to the officers of the navy, "under no circumstances to seize any foreign vessel within waters of a friendly nation," and wrote to Lord Lyons, that, if any act of hostility or pursuit was committed within the maritime jurisdiction of Great Britain, the act would be disavowed, and ample redress would be promptly given.

Note 208, Dana's Wheaton; Mr. Seward to Lord Lyons, June 16, 1863; Diplomatic Correspondence, 1863, p. 581.

This Government adheres to, recognizes, and insists upon the principle that the maritime jurisdiction of every nation covers a full marine league from the coast and acts of hostility or authority within that limit can not be legally exercised, and if committed or exercised will certainly bring upon the offending party the displeasure of this Government.

Instructions of United States Secretary of the Navy, September 23, 1864.

A vessel within a marine league of a neutral coast is regarded as free from interruption. It is not lawful to chase, fire at, bring to, or capture any vessel within the waters or jurisdiction of a neutral.

Instructions of United States Secretary of the Navy, September 23, 1864.

These powers [of visit, search, and detention] may be exercised in any Waters except the Territorial Waters of a Neutral State. The Territorial Waters of a State are those within three miles from low water mark of any part of the Territory of that State, or forming bays within such Territory, at any rate in the case of bays the entrance to which is not more than six miles wide.

These powers may not be exercised over a Vessel in Neutral Territorial Waters, although she may have been beyond those limits when first descried or chased.

Holland, pp. 1 and 2.

The stopping, examining, and seizing of hostile or suspected vessels and cargoes is permitted in all parts of the sea and other waters,

with the exception of waters which are under the dominion of a neutral Power, or from which warlike operations are excluded by special international Agreements.

Russian Regulations, 1895, Article 16.

#### **Territorial waters.**

The area of maritime warfare comprises the high seas or other waters that are under no jurisdiction, and the territorial waters of belligerents. Neither hostilities nor any belligerent right, such as that of visitation and search, shall be exercised in the territorial waters of neutral States.

The territorial waters of a State extend seaward to the distance of a marine league from the low-water mark of its coast line. They also include, to a reasonable extent, which is in many cases determined by usage, adjacent parts of the sea, such as bays, gulfs, and estuaries inclosed within headlands; and where the territory by which they are inclosed belongs to two or more States, the marine limits of such States are usually defined by conventional lines.

U. S. Naval War Code, 1900, Article 2.

Visit, search, or capture may not take place in the territorial waters of a neutral Power, nor in waters which are by Treaty clearly placed outside the area of hostile operations.

Japanese Regulations, 1904, Article 2.

The right of capture does not hold:—

(a) Within neutral waters, i. e. within a sea area three sea miles wide, measured from the low water coast line, bordering the coast and the islands and indentations appertaining thereto. As appertaining are:—Islands which are no farther than six sea miles distant from one of the mainland coasts of the same state; indentations whose coast is exclusively in the possession of the neutral state and whose opening is six sea miles or less wide.

(b) Within those waters which are by convention closed to operations of war or to ships of war. These are:

- (a) The Suez Canal, including its entrance harbors and a sea area of three sea miles beyond them (Article 4, Section 1, of the Treaty of Constantinople of 29, October 1888).
- (b) The Bosphorus and the Dardanelles, so far as Turkey is not herself a belligerent. (Treaty of London concerning narrow seas of July 13, 1841; Article 10 of the Peace of Paris of 30, March 1865 and Appendix I thereto; Article 2 of the Treaty of London of 13, March 1871; Article 63 of the Treaty of Berlin of 13, July 1878.).
- (c) The waters of Corfu and Paxos, so far as no other power than Greece, Great Britain, France, Russia, Austro-Hungary, and Germany are parties to the war (Article 2 of the Treaty of London of 14, November 1863, and Article 2 of the Treaty of London of 24, March 1864).
- (d) The mouths of the Danube (Article 52 of the Treaty of Berlin of 13, July 1878).
- (e) The mouths of the Congo and Niger and the Coastal waters adjacent thereto (General agreement of the Berlin Conference of 26, February 1888, Articles 25 and 33.).

The right of capture may also be no further exercised when a merchant vessel during the course of pursuit or while under visit and search reaches the waters referred to in (a) and (b).

A ship seized in violation of the foregoing provisions is to be released immediately, especially at the request of the neutral Government.

German Prize Rules, 1909, Article 3.

Article 2, Hague Convention XIII, 1907, is substantially identical with section 122, Austro-Hungarian Manual, 1913.

In 1801 an English frigate seized some Swedish vessels at Oster Risør, within Norwegian waters. Lord Hawkesbury expressed the regret of the English Government that the Danish sovereignty had been violated, but failed to see that the international illegality of the capture required the application of an international remedy; and professing that the government had no power to restore the ships, referred the aggrieved parties to the courts. Count Wedel-Jarlsberg, the Danish Minister of Foreign Affairs, declared that his sovereign "would never consent that the open violation of his territory should be submitted under any pretext whatever to the decision of the courts." In the end Lord Hawkesbury receded from his pretension, and the ships were given up.

Hall, page 85 and note; Ortolan, *Dip. de la Mer*, Annexe F, ii, 427-33.

"The invasion of neutral rights by an attack on one belligerent cruiser by another on neutral waters is not condoned by the fact that the chase was begun outside of the neutral line."

Mr. Madison, Secretary of State to Mr. Monroe, November 25, 1806; Moore's Digest, Vol. VII, p. 1088.

"The pursuit by a belligerent cruiser of an enemy's ship within neutral waters, and driving the latter ashore, is a violation of the law of nations."

Mr. Seward, Secretary of State, to Mr. Tassara, Spanish Minister, May 21, 1863; Moore's Digest, Vol. VII, p. 1089.

**Exception in case of military occupation of territorial waters by seizing power.**

*The "Eliza Ann,"* 1 *Dodson*, 244.—This was the case of seizure of American vessels in Swedish territorial waters during the year 1812, after the declaration of war between the United States and Great Britain. Earlier in the year, England and Sweden had been at war, but prior to the seizure had signed a treaty of peace, which, however, had not then been ratified. At the time of the seizure the territorial waters in which it took place, were in possession of British forces.

Held that Sweden was not a neutral power at the time of the seizure (1), because the treaty of peace had not been ratified, and (2), because she admitted to her ports American vessels but excluded British vessels.

Also held that there was no violation of Swedish territory as the waters where the seizure took place were then under British military occupation.

The acts of the boats of a man of war are the acts of the ship.

*"Twee Gebroeders,"* 3 *C. Rob.*, 162.—In this case four Dutch ships, during the blockade of Amsterdam by the British were captured by

the boats of two British cruisers, when the cruisers themselves were lying within neutral waters.

Held that the sending out of the boats was the commencement of a hostile act, and thus there was a violation of neutral territory.

The court said that the situation was comparable to that of the firing of a cannon by a cruiser lying in neutral waters, the shot striking outside of such waters.

The neutral sovereign can alone question the validity of the capture.

*The "Anne," 3 Wheaton, 435.*—The court said: "A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him and him only is it to be considered void. The enemy has no rights whatsoever, and if the neutral sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities; and the doctrine rests on well-established principles of public law."

See to the same effect *The Eliza Anne*, 1 Dod., 244; *The Purissima Conception*, 6 C. Rob., 45; *The Diligentia*, 1 Dod., 404; *The Etrusco*, Lords, 1795; *The Lilla*, 2 Sprague, 177; *The Adela*, 6 Wall., 266; *The Florida*, 101 U. S., 37.

Seizure, within neutral waters, not matter for cognizance by court.

*Ship Richmond v. United States, 9 Cranch, 102.*—In this case it was held that the seizure of a vessel by the naval force of the United States in waters belonging to a friendly power, though an offense against that power, is a matter to be adjusted between the two Governments and not within the cognizance of the court, and does not render unlawful judicial proceedings against the vessel, instituted after her arrival within the jurisdiction of the United States.

See also, *The Merino*, 9 Wheaton, 391.

*Commodore Stewart's Case, 1 Ct. Cl., 113.*—The court said: "Hostilities begun or continued in a neutral territory must violate the rights of sovereignty of the neutral power, and therefore the law of nations forbids the belligerent power to begin or continue hostilities in the territory or ports under the dominion of the neutral sovereign."

*The "Sir William Peel," British and American Claims Commission, 1871.*—In this case the claimants were awarded damages, on the ground, as stated in Hale's Report of the Commission, "that the capture within the neutral waters of Mexico was absolutely illegal and void; and that the claimants were entitled to make reclamation on that ground, irrespective of any question of complaint or intervention on the part of Mexico."

What are territorial waters.

*The "Rossia," Russian and Japanese Prize Cases, vol. 2, p. 39.*—Held that the limit of territorial waters is three nautical miles from the coast.

See also *The Michael*, Russian and Japanese Prize Cases, vol. 2, p. 80.

**What constitutes a neutral power.**

*The "Ekaterinoslav," Russian and Japanese Prize Cases, vol. 2, p. 1.*—Held that even if the capture took place within Korean waters, it was not illegal, since during the Russo-Japanese war, not only did Corea consent to the landing and passage of the Japanese army in her territory, but at the beginning of the war battles were fought there, and therefore Corea could not be considered as a neutral in the ordinary sense.

See also *The Mukden*, Russian and Japanese Prize Cases, vol. 2, p. 12;  
*The Michael*, id., 80.

OBLIGATIONS OF NEUTRAL POWER AND CAPTOR GOVERNMENT WITH RESPECT TO PRIZE  
CAPTURED IN WATERS OF THE NEUTRAL.

When a ship has been captured in the territorial waters of a neutral Power, this Power must employ, if the prize is still within its jurisdiction, the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.

If the prize is not in the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.—*Hague Convention XIII, 1907, Article 3.*

His Swedish Majesty shall use all the means in his power to protect and defend the vessels and effects belonging to citizens or inhabitants of the United States of North America, and every of them which shall be in the ports, havens, roads, or on the seas near the countries, islands, cities and towns of His said Majesty, and shall use his utmost endeavours to recover and restore to the right owners all such vessels and effects which shall be taken from them within his jurisdiction.

In like manner the United States of North America shall protect and defend the vessels and effects belonging to the subjects of His Swedish Majesty, which shall be in the ports, havens, or roads, or on the seas near to the countries, islands, cities and towns of the said States, and shall use their utmost efforts to recover and restore to the right owners all such vessels and effects which shall be taken from them within their jurisdiction.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, separate articles 1 and 2.

Seizures made in neutral waters, or in waters protected by treaty from acts of war, are invalid. The vessels or objects captured should be returned to the neutral State or States bordering the water to be restored by the latter to the original owner. Furthermore, the State of the captor is responsible for all damages and loss.

Institute, 1882, p. 47.

If the enemy be attacked, or any capture made, under neutral protection, the neutral is bound to redress the injury, and effect restitution.

Kent, vol. 1, p. 124.

A neutral has no right to inquire into the validity of a capture, except in cases in which the rights of neutral jurisdiction were violated; and, in such cases, the neutral power will restore the property,

if found in the hands of the offender, and within its jurisdiction, regardless of any sentence of condemnation by a court of a belligerent captor.

Kent, vol. 1, p. 128.

Though it is the duty of the captor's country to make restitution of the property thus captured within the territorial jurisdiction of the neutral State, yet it is a technical rule of the prize courts to restore to the individual claimant, in such a case, only on the application of the neutral government whose territory has been thus violated. This rule is founded upon the principle, that the neutral State alone has been injured by the capture, and that the hostile claimant has no right to appear for the purpose of suggesting the invalidity of the capture.

Dana's Wheaton, pp. 525, 526, 527.

Where a capture of enemy's property is made within neutral territory, \* \* \* it is the right as well as the duty of the neutral State, where the property thus taken comes into its possession, to restore it to the original owners. This restitution is generally made through the agency of the courts of admiralty and maritime jurisdiction.

Dana's Wheaton, p. 528.

If a neutral vessel, which has violated neutrality so as to make herself liable to condemnation as prize, is captured as such at sea by a cruiser, and sent in for adjudication, the court will condemn her as prize, on the merits of the case. It is not a valid defence that the place of her arrest was the waters of some other neutral power. The breach of sovereign territorial right is a matter solely between the State making the capture and the State whose territory is entered upon. The demand made by the latter State may involve the restitution of the prize, and so, if complied with, operate in favor of the vessel in the hands of the court, whether neutral or enemy; but that is only an indirect effect. If the offended State does not demand restitution, or if the belligerent government refuses it, the prize will be condemned. It is not to be supposed that even the demand of the neutral State would operate directly a restitution of the prize, by the court, against the will or without the consent of the sovereignty under which the court sits. In short, the question is one of international diplomacy, and not a rule of decision in prize law between the captor and the claimant.

Note 209, Dana's Wheaton.

It has been judiciously determined that this peculiar jurisdiction to inquire into the validity of captures made in violation of the neutral immunity, will be exercised only for the purpose of restoring the specific property, when voluntarily brought within the territory, and does not extend to the infliction of vindictive damages, as in ordinary cases of maritime injuries. And it seems to be doubtful whether this jurisdiction will be exercised where the property has been once carried *infra praesidia* of the captor's country, and there regularly condemned in a competent court of prize. However this may be in cases where the property has come into the hands of a *bonâ fide* purchaser, without notice of the unlawfulness of the cap-



ture, it has been determined that the neutral court of admiralty will restore it to the original owner, where it is found in the hands of the captor himself, claiming under the sentence of condemnation.

Dana's Wheaton, p. 531.

It is a well established principle of the law of nations that if the property of belligerents, when within the neutral jurisdiction, be attacked, or any capture made, the neutral is bound to redress the injury and effect restitution. \* \* \* If a neutral state neglects to make such restitution, and to enforce the sanctity of its territory, but tamely submits to the outrages of one of the belligerents, it forfeits the immunities of its neutral character with respect to the other, and may be treated by it as an enemy.

Halleck, pp. 530-531.

Although it is the duty of a belligerent state to make restitution of the property captured within the territorial jurisdiction of a neutral state, yet it is a technical rule of the prize court to restore to the individual claimant, in such a case, only on the application of the neutral government whose territory was violated in effecting the capture. This rule is founded upon the principle, that the neutral state alone has been injured by the capture, and that the hostile claimant has no right to appear, for the purpose of suggesting the invalidity of the capture. He must look to the neutral government for redress of the violation of the right of asylum, and that government is bound to effect a restitution, or procure indemnity for the injury suffered. This claim is usually preferred by the ambassador of the neutral state in the captor's country, to the prize court before which the captured property is brought for adjudication.

Halleck, p. 531.

#### Extension of rule.

But if the property captured in violation of neutral rights comes into the possession of the neutral state, it is the right and duty of such state to restore it to its original owners. This restitution is generally made through the agency of the courts of admiralty and maritime jurisdiction. Traces of the exercise of such a jurisdiction are found in the history of English jurisprudence as early as the reigns of Charles II. and James II., and are now matters of ordinary occurrence in English and American courts of admiralty. Such restitution is not confined to captures within neutral jurisdiction, but extends to all captures made in violation of neutral rights, such as by vessels which had been armed and equipped, or had received military munitions, or had enlisted men, or in any other way had violated the sanctity of neutral territorial jurisdiction.

Halleck, pp. 531-532.

The power and duty of the United States to restore captures made in violation of our neutral rights and brought into American ports, have never been matters of question; \* \* \*

Halleck, p. 532.

If such property, captured in violation of neutral immunity, be carried *infra praesidia* of the captor's country, and there regularly

condemned in a competent court of prize, the question arises whether the courts of the neutral state will exercise jurisdiction, and restore such property to the original owners. If the property be found in the hands of the original wrongdoer, it will be restored by the court, notwithstanding a valid sentence of condemnation, properly authenticated. The offender's touch is said to restore the taint from which the condemnation may have purified the prize, and it is not for him to claim a right springing out of his own wrong.

Halleck, p. 533.

\* \* \* a belligerent can exercise no rights of war within the territorial jurisdiction of a neutral state, and \* \* \* this jurisdiction extends, not only within ports, headlands, bays, and the mouths of rivers, but to a distance of three miles from the shore itself. All captures, therefore, made by belligerents, within these limits, are, in themselves, invalid. But this invalidity can be set up only by the government of the neutral state, for, as to it only, is the capture to be considered void; as between enemies, it is deemed, to all intents and purposes, rightful. With respect to the enemy, no right is thereby violated; but with respect to the neutral, an offense has been committed, and he may restore the prize if in his power, or otherwise demand satisfaction. But if he omits or declines to interpose any claim, it is condemnable, *jure belli*, to the captors.

Halleck, p. 726.

If such a prize [captured in the neutral's waters] is brought to any of the neutral's ports, he is authorized to seize and restore it. If it be carried into a port of another country, he has a right to demand its restoration, and the prize court of the belligerent is bound to respect the objection. If the neutral fails to exercise his rights in these respects, the government of the vessel which has been thus captured may complain or even retaliate. \* \* \* Or its government, if the neutral prefer, or is forced to take that mode of redress, may be required to give satisfaction in regard to the injury.

Woolsey, p. 283.

In 1759, when Admiral Boscawen pursued a French squadron into Portuguese waters and captured two vessels, the government of Portugal, though perfectly indifferent in fact, was obliged to demand reparation in order to avoid embroilment with France; and as full reparation by surrender of the vessels was not exacted, France subsequently alleged that the neutrality of Portugal was fraudulent, and grounded her declaration of war in 1762 in part upon the occurrence.

Hall, p. 605.

It follows from the fact of a violation of the sovereignty of a nation being an international wrong, that the injured country has the right of demanding redress; and the obligation under which a neutral state lies to prevent infraction of its neutrality would seem to bring with it the duty of enforcing such redress in all cases in which the state would act if its own dignity and interests were alone affected. Its duty cannot be less than this, because quiescence under any act, which apart from the interests of the belligerent would not be per-

mitted, is the concession of a special favour to his enemy; and it cannot be more, because no one has a right to expect another to incur greater inconvenience or peril for him in their common quarrel than a man actuated by the ordinary motives would undergo on his own account. A state is supposed not to allow open violations of its territory to take place without exacting reparation; it is therefore expected to demand such reparation in the interest of the belligerent who may have received injury at the hands of his enemy within the neutral jurisdiction. And, as, from the exclusive force of the will of a sovereign state, all acts contrary to it done within the territory of the state are void, the redress which it is usual to enforce consists in a replacement in its anterior condition, so far as may be possible, of anything affected by the wrongful act.

Hall, pp. 643, 644.

#### **Extension of rule—Exception.**

If an occasion offers, the neutral sovereign will take upon himself to undo the wrongful act of the belligerent. When property is captured in violation of neutrality, whether actually within the neutral territory, or by a vessel fitted out in a neutral port, it will be seized on entering the neutral jurisdiction, and will be restored to its original owner; \* \* \* The case however stands differently when the captured property is a ship which, before returning to the neutral port, has been furnished with a commission from the captor's sovereign. The Admiralty courts of the neutral may enquire whether the vessel is in fact commissioned; but so soon as it is proved to be invested with a public character, though the right of the neutral state to expect redress for the violation of its sovereignty remains unaltered, its own right to apply the remedy is gone. The vessel has become invested with the immunities belonging to public ships of a state. Its seizure would therefore be an act of war, and the neutral can only apply for satisfaction to the offending belligerent.

Hall, pp. 645-647.

#### **Exception.**

A belligerent who, when attacked in neutral territory elects to defend himself instead of trusting for protection or redress to his host, by his own violation of sovereignty frees the neutral from responsibility.

Hall, p. 648.

#### **Exception.**

In 1814 an American privateer, the *General Armstrong*, was found at anchor in Fayal harbour by an English squadron. A boat detachment from the latter approached the privateer and was fired upon. The next day one of the vessels of the squadron took up position near the *General Armstrong* to attack her. The crew, not finding themselves able to resist, abandoned and destroyed her. The United States alleged that the Portuguese governor had failed in his duty as a neutral, and demanded a large compensation for the owners of the privateer. After much correspondence the affair was submitted in 1851 to the arbitration of the President of the French Republic, who held that as Captain Reid, of the privateer, 'had not applied at the

beginning to the neutral, but had used force to repel an improper aggression, of which he stated himself to be the object, he had himself disregarded the neutrality of the territory in which he was, and had consequently released its sovereign from all obligations to protect him otherwise than by his good offices; that from that moment the Portuguese government could not be responsible for the results of a collision which had taken place in contempt of its sovereign rights.

Hall, pp. 648, 649; Ortolan, *Dip. de la Mer*, ii, 547.

Of course the government of which the neutrality has been violated must do what it can to enforce the restitution of the peccant prize, being within its jurisdiction.

Westlake, vol. 2, p. 230.

If for instance it [a belligerent] captures a prize within neutral waters a double wrong is done. Both the power whose authority is set at naught and the power which loses its vessel suffer through its misdeed. The injured belligerent must apply for redress to the neutral within whose jurisdiction the unlawful act was committed, and the neutral has a claim against the injuring belligerent for breaking the peace in contempt of its sovereign rights. The proper reparation, or at least an important part of it, is the return of the prize to the spot where it was unlawfully taken. And when it has been given up to the power which was injured by its seizure, it should be restored by that power to those from whose custody it was originally snatched. Indeed, the duty of restoration goes further. The neutral ought to make every effort to obtain the return of the vessel. It must resort to diplomacy, but it need not rely on that alone; for if the ship is still within its jurisdiction, force may be used to take it from those who hold unlawful possession. \* \* \* But the Convention [Hague, XIII of 1907] does not lay on the neutral state an obligation to demand surrender, though it asserts the duty of the belligerent to give up its prize, if the demand should be made. It may, however, be maintained on good grounds that the neutral obligation in question is created by ordinary International Law.

Lawrence, pp. 649, 650, 651.

\* \* \* if belligerent men-of-war seize enemy vessels in ports of a neutral, and if the neutral, who could not or did not prevent this, exacts no reparation from the belligerent concerned, the other party may make the neutral responsible for the losses sustained.

Oppenheim, vol. 2, p. 441-442.

Only as regards capture of enemy vessels in neutral waters has a practice grown up, which must be considered binding, and according to which the neutral must claim the prize, and eventually damages, from the belligerent concerned, and must restore her to the other party.

Oppenheim, vol. 2, p. 443.

In 1864, during the American Civil War, when the Confederate cruiser *Florida* was captured by the Federal cruiser *Wachusett* in the neutral Brazilian port of Bahia, Brazil claimed the prize. As the latter had sunk while at anchor in Hampton Roads, she could

not be restored, but the United States expiated the violation of neutrality committed by her cruiser by court-martialing the commander; further, by dismissing her Consul at Bahia for having advised the capture; and, finally, by sending a man-of-war to the spot where the violation of neutrality had taken place for the special purpose of delivering a solemn salute to the Brazilian flag.

Oppenheim, vol. 2, pp. 443-444; Moore's Dig., Vol. VIII, sec. 1334, p. 1090.

#### British laws.

If, during the continuance of any war in which Her Majesty may be neutral, any ship, goods, or merchandize captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or despatched, or the force of which may have been augmented, contrary to the provisions of this Act, are brought within the limits of Her Majesty's dominions by the captor, or any agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent, or for any person authorized in that behalf by the Government of the foreign State to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the Court shall, on due proof of the facts, order such prize to be restored.

Every such order shall be executed and carried into effect in the same manner, and subject to the same right of appeal as in case of any order made in the exercise of the ordinary jurisdiction of such court; and in the meantime, and until a final order has been made on such application, the court shall have power to make all such provisional and other orders as to the care or custody of such captured ship, goods, or merchandise, and (if the same be of a perishable nature, or incurring risk of deterioration) for the sale thereof, and with respect to the deposit or investment of the proceeds of any such sale, as may be made by such court in the exercise of its ordinary jurisdiction.

British Foreign Enlistment Act, 1870, Article 14.

It was held by the Attorney General of the United States in 1793 that the seizure by one belligerent, in neutral territory, of a ship belonging to another belligerent, is unlawful and that the ship must be restored.

1 Op. Atty. Gen., 32.

Sometimes it happens that, after capturing a Vessel, the Commander ascertains that the Capture was made in Neutral Territorial Waters. In such case he should release her, if an express application is made by the Authorities of the Neutral Territory for her restoration.

Holland, p. 2.

**Property not to be given up except upon application of neutral Power, made within a year after capture.**

Property seized in waters which are under the dominion of a neutral Power, or from which warlike operations are excluded by special international Agreements, is not to be returned to its original owner,

and he is not to be indemnified for losses caused by the property being detained or damaged, unless application is made by the neutral Power concerned, or by a Power which is a signatory of the Agreements referred to, and unless such application is made within one year from the day on which the property was seized. If no application is made within the time specified, the captured property is to be confiscated for the benefit of the State, and no prize-money is to be paid to the captor.

Russian Regulations, 1895, Article 31.

A ship seized in violation of the foregoing provisions [within neutral waters or those closed by convention to operations of war or to ships of war] is to be released immediately, especially at the request of the neutral Government.

German Prize Rules, 1909, Article 3.

Article 3, Hague Convention XIII, 1907, is substantially identical with section 123, Austro-Hungarian Manual, 1913.

Genet [the French Minister] claimed the right of remaining in our ports, under the 17th and 26th articles of the Treaty of Commerce. But the government held that the privilege did not extend to vessels fitted out in our ports to cruise against friendly commerce.

The British Minister claimed that the prizes captured by such cruisers, and coming within American jurisdiction, should be restored. This claim was embarrassing to Washington, under the treaty with France. The result was, a despatch of 5th June, 1793, to the British and French ministers, which became an epoch in American neutrality. It declared that the fitting-out and commissioning of cruisers would be prohibited hereafter, and demanded the departure of such vessels from our ports; but, as to the surrender of prizes already taken by French privateers so fitted out, the government declined to enforce it, on the ground that these acts were done in remote ports, at the beginning of the war, before the proclamation, when parties did not know their rights under the treaty, and the laws of nations were not ascertained, and the difficulty of communication was great; and that, if the United States did its duty in suppressing such acts in the future, it ought to be accepted as a reasonable measure of justice between the belligerent powers, under the peculiar situation of the country. It was suggested also, that, if the captures were invalid, the Courts of Admiralty in the United States would deliver up the prizes, on private application and suit.

Note 215, Dana's Wheaton.

In the year 1793, the British ship *Grange* was captured in Delaware Bay by a French frigate, and upon due complaint, the American government caused the British ship to be promptly restored.

Mr. Jefferson's letter to Mr. Ternaut, of May 15, 1793; Kent, vol. 1, p. 125.

On the liability of a neutral government to respond in damages for captures made in its waters.

During the wars immediately preceding the Peace of Amiens, many claims arose on the part of citizens of the United States against Spain on account of captures made either by French privateers fitted out in Spain or by French privateers in Spanish waters, as well as

on account of condemnations by French consuls or other French agents in Spanish jurisdiction. The Spanish Government denied its liability, first, on the ground that it was unable to prevent the acts complained of, and, secondly, on the ground that the primary liability rested on France, and that as France was (so the Spanish Government contended) released from any liability for the claims by the convention with the United States of Sept. 30, 1800, the secondary liability of Spain was released. The United States, on the other hand, maintained (1) that Spain was primarily liable; (2) that the renunciation of the convention of 1800 extended only to claims for which France was primarily liable, and (3) that the inability of Spain to prevent the acts complained of was not established. Mr. Madison, in an instruction of October 25, 1802, took the ground, as to the last point, that, in order to excuse a sovereign for permitting a violation of his neutrality, it must "be shown that the force or danger which destroyed the free agency really existed, and that all reasonable means were employed to prevent or remedy the evil resulting." By the treaty of February 22, 1819, the United States renounced its claims against Spain and undertook to compensate its own citizens to the amount of \$5,000,000. Among the claims embraced in this settlement were those "on account of prizes made by French privateers, and condemned by French consuls, within the territory and jurisdiction of Spain."

Moore's Digest, vol. vii, p. 1053; Mr. Marshall, Secretary of State, to Mr. Humphreys, minister to Spain, September 8, 1800, MS. Inst. U. S. Ministers, V. 358; Mr. Madison, Secretary of State, to Mr. Pinckney, minister to Spain, October 25, 1802, id., VI, 57; same to same, February 6, 1804, id., 196; Mr. Madison to Mr. Monroe, October 26, 1804, id., 256.

The minister of Colombia having complained of the capture within the territorial waters of the United States by the *Mars* and another Spanish brig of the Colombian privateer *Zulmi*, which was taken to Havana and detained there, together with the crew, the minister of the United States in Madrid was directed to present the case to the Spanish Government "and demand an immediate restoration of the *Zulmi* and her crew," as well as damages for her unlawful capture and detention. "A compliance with this demand," said the Department of State, "is due to the violated authority of the United States, and to the fidelity with which this Government has observed a neutrality during the existing war."

Moore's Digest, Vol. VII, p. 1089; Mr. Clay, Secretary of State to Mr. Everett, minister to Spain, January 15, 1827.

*The "Perle," 1 Pistoye et Duverdy, 100.*—In this case, it was decided that a belligerent capture in neutral waters, is illegal under the guns of a port, or on the undefended coast, and the captured ship will be restored by the courts (French) of the captor's country.

Scott's Cases, p. 688, note.

*The "Anna," 5 C. Rob., 373.*—This was the case of an American ship which was captured by a British privateer near the mouth of the Mississippi river, or within three miles from uninhabited islands, "which form a kind of portico to the mainland," then being French territory.

Held that the capture was illegal.

### Exception.

The "*Anne*," 3 *Wheaton*, 435.—The Court said: "There is one other point in the case which, if all other difficulties were removed, would be decisive against the claimant. It is a fact that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self-defence. The privateer had an equal title with herself to the neutral protection, and was in no default in approaching the coast without showing her national character. It was a violation of that neutrality which the captured ship was bound to observe, to commence hostilities for any purpose in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign."

"*La Amistad de Rues*," 5 *Wheaton*, 385.—In this case it was held that a civil court of a neutral country cannot adjudicate upon the validity of a capture *jure belli*, as between the captor and the prize. Its only function is to vindicate the offended sovereignty of its own country, when the capture was made in violation of the neutrality of the country.

*The "Alerta"*, 9 *Cranch*, 359.—In this case the court said: "The general rule is undeniable, that the trial of captures made on the high seas, *jure belli*, by a duly commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the courts of that nation to which the captor belongs. To this rule there are exceptions which are as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country into which the prize is brought, or by a privateer which had been illegally equipped in such neutral country, the prize courts of such neutral country not only possess the power, but it is their duty to restore the property so illegally captured to the owner. This is necessary to the vindication of their own neutrality."

See also *The Nancy*, 4 Fed. Cases, No. 1898; *The Betty Cathcart*, 17 Fed. Cases, No. 9742; *Talbot v. Jansen*, 3 Dallas, 133; *Glass v. The Betsey*, id., 6; *The Invincible*, 1 *Wheaton*, 238; *La Conception*, 6 *Wheaton*, 235; *The Santissima Trinidad*, 7 *Wheaton*, 283; *The Gran Para*, 7 *Wheaton*, 471; *The Arrogante Barcelones*, 7 *Wheaton*, 496.

*The Florida*, 101 U. S., 37.—The court said: "A capture in neutral waters is valid as between belligerents. Neither a belligerent owner nor an individual enemy owner can be heard to complain. But the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored."

See also *The Sir William Peel*, 5 Wall., 517; *The Anne*, 3 Wheat., 435; and *The Adela*, 6 Wall., 266.



PRIZE COURT, IN NEUTRAL TERRITORY OR WATERS, FORBIDDEN.

**A Prize Court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters.**—*Hague Convention XIII, 1907, Article 4.*

But a prize court of the captors cannot sit in a neutral territory, nor can its authority be delegated to any tribunal sitting in neutral territory. The reason of this rule is obvious. Neutral ports are not intended to be auxilliary to the operations of the belligerents, and it is not only improper but dangerous to make them the theatre of hostile proceedings. A sentence of condemnation by a belligerent prize court in a neutral port is, therefore, considered insufficient to transfer the ownership of vessels or goods captured in war, and carried into such port for adjudication.

Halleck, p. 757.

Nor can he [a neutral state] allow his courts to be employed in deciding upon the validity of captures made by belligerent vessels.

Woolsey, p. 275.

Even when a prize lies in a neutral port, the belligerent power whose cruisers have captured her cannot set up a court there to try the capture. The exercise of jurisdiction being a right attached to sovereignty, to attempt it anywhere without the permission of the territorial sovereign would be a usurpation, and for that sovereign to grant the permission would be an unneutral loan of his sovereignty to the belligerent.

Westlake, vol. 2, p. 244.

Among the uses of its territory a neutral is bound to prevent must be reckoned the setting up in it of a belligerent prize court.

Lawrence, p. 635.

During the eighteenth century it was not considered illegitimate on the part of neutrals to allow the setting up of Prize Courts on their territory \* \* \*. But since in 1793 the United States of America disorganized the French Prize Courts set up by the French envoy Genêt on her territory, it became recognised that such Prize Courts are inconsistent with the duty of impartiality incumbent upon a neutral, and article 4 of Convention XIII. enacts this formerly customary rule.

Oppenheim, vol. 2, p. 395.

It has long been universally recognised that the duty of impartiality must prevent a neutral from permitting a belligerent to set up Prize Courts on neutral territory. The intention of a belligerent in

setting up a court on neutral territory can only be to facilitate the plundering by his men-of-war of the commerce of the enemy. A neutral tolerating such Prize Courts would, therefore, indirectly assist the belligerent in his naval operations.

Oppenheim, vol. 2, p. 395.

The privateers fitted out in the United States [in 1793], under the auspices of the French Minister and French consuls, took many prizes, and brought them into ports of the United States. In these ports, the French consuls undertook to hold prize courts, authorized thereto by the French Republic, and to condemn and sell the prizes. The British Minister, Mr. Hammond, remonstrated. M. Genet claimed the right under the law of nations and the Treaty of Commerce. The claim was denied by the United States Government, in a letter by the Secretary of State, Mr. Jefferson; and the ground was taken, that, of national right, all judicial functions within the territory of the United States must be exercised only by the government of the United States, and that such right had not been impaired by any treaty with France. This, with the decision of the Supreme Court in *The Betsey*, put an end to French consular courts of prize in the United States.

Note 215, Dana's Wheaton; 1 Am. State Papers, p. 144; 3 Dallas, 6.

\* \* \* under no circumstances can proceedings for Adjudication [on a prize] be instituted in a Neutral Country.

Holland, p. 85.

Article 4, Hague Convention XIII, 1907, is substantially identical with section 124, Austro-Hungarian Manual, 1913.

*The "Flad Oyen,"* 1 C. Rob., 135.—In determining whether a belligerent could set up a Prize Court in neutral territory, Lord Stowell repudiated the condemnation, by the French Consul in Bergen, of an English prize vessel carried there by a French privateer.

*Donaldson v. Thompson*, 1 Camp., 429.—The court said: "The sentence was pronounced by a belligerent on neutral territory, and is therefore void."

*Glass v. Sloop "Betsey,"* 3 Dallas, 6.—In this case it was held that no foreign power can of right institute or erect any court in the United States, except such as may be warranted by treaties, and that the admiralty jurisdiction which has been exercised in the United States by French consuls, not being so warranted, was not of right and could not be recognized.

Prize court may be set up in territory of an ally.

See *Cady v. Bovill*, 2 East., 473; *The Harmony*, 2 C. Rob., 210n; *The Adelaide*, id.; and *The Betsy Kruger*, id.

USE OF NEUTRAL WATERS AS BASE OF NAVAL OPERATIONS FORBIDDEN—ESPECIALLY AS  
TO APPARATUS OF COMMUNICATION.

**Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.—Hague Convention XIII, 1907, Article 5.**

A neutral Government is bound—

\* \* \* \* \*  
Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other,  
\* \* \*

Treaty of Washington, for the arbitration of the "Alabama Claims," concluded between the United States and Great Britain, May 8, 1871, Article VI.

Likewise, the neutral State should not permit nor suffer one of the belligerents to use its ports or waters as a naval base of operations against the other, \* \* \*.

Institute, 1875. p. 13.

For a ship to station herself within the neutral line, and send out her boats on hostile enterprises, was an act of hostility much too immediate to be permitted.

Kent, vol. 1, p. 126.

The neutral border must not be used as a shelter for making preparations to renew the attack; and though the neutral is not obliged to refuse a passage and safety to the pursuing party, he ought to cause him to depart as soon as possible, and not permit him to lie by and watch his opportunity for further contest.

Kent, vol. 1, p. 127-128.

Not only are all captures made by the belligerent cruisers within the limits of this jurisdiction [the maritime territorial jurisdiction of a neutral State] absolutely illegal and void, but captures made by armed vessels stationed in a bay or river, or in the mouth of a river, or in the harbor of a neutral State, for the purpose of exercising the rights of war from this station, are also invalid. \* \* \* no *provisimate* acts of war are in any manner to be allowed to originate on neutral ground.

Dana's Wheaton, pp. 520, 521.

\* \* \* nor can neutral ports or waters be made a base of operations. Cruising within those limits, to prevent entrance or exit by

an enemy, is prohibited, and all forms of using the asylum of neutral waters for hostile acts.

Note 208, Dana's Wheaton.

Persons in the service of the insurgent colonies [in South America] seized upon two places near the American coast, but beyond our jurisdiction, and not within the certain limits of any responsible power (Amelia Island and Galveston), and made them bases of naval operations against Spain and Portugal. President Madison having called the attention of Congress to this state of things, Congress recommended the suppression of these establishments, and the President took the extreme step of breaking them up by a military force, apparently on the ground that they were a kind of international nuisance, which it was in our power to suppress without a serious violation of territoriality of any responsible sovereign.

Note 215, Dana's Wheaton.

\* \* \* it is a violation of neutrality for a neutral state to \* \* \* open harbors for hostile enterprises; or to allow the presence of any individual or vessel pertaining to a belligerent state within his territory, when believed to be stationed there for the purpose of carrying out a hostile undertaking; \* \* \*

Woolsey, p. 275.

Much the larger number of cases in which the conduct of a neutral forms the subject of complaint is when a belligerent uses the safety of neutral territory to prepare the means of ultimate hostility against his enemy, as by fitting out expeditions in it against a distant objective point, or by rendering it a general base of operations. In many such cases the limits of permissible action on the part of the belligerent, and of permissible indifference on the part of the neutral, have not yet been settled. Generally the neutral sovereignty is only violated constructively. The acts done by the offending belligerent do not involve force, and need not entail any interference with the supreme rights of the state in which they are performed. They may be, and often are, innocent as regards the neutral except in so far as they endanger the quiescence of his attitude towards the injured belligerent; and their true quality may be, and often is, perceptible only by their results.

At the root of this class of cases lies the principle that a neutral state cannot allow its territory to become a scene of hostile operations to the disadvantage of one of two belligerents. The extension of this principle to acts of hostility taking their commencement in neutral ground and leading to immediate violence, which was made by Lord Stowell, is equally applicable to acts the completion of which is more remote in point of time or place, but which have been as fully prepared within the neutral territory. All such acts must be offences against the neutral on the part of the belligerent performing them; and if knowingly permitted by the neutral they are offences on his part against the belligerent for whose injury they are intended. Ordinarily their identification presents little difficulty. There could be no question as to the nature of the filibustering expeditions from the United States, of those which fed the Cretan insurrection of 1867, or of the Fenian incursions into Canada; and there

can be as little question that the conduct of the Greek and American governments presented examples of grave deviations from the spirit of the rule of neutrality and from the letter of that which guides nations in time of general peace. In cases of this kind the neutral country is brought under the common military definition of a base of operations; it becomes the territory "from which an army" or a naval force "draws its resources and reinforcements, that from which it sets forth on an offensive expedition, and in which it finds a refuge at need."

But there are some cases in which the question whether a neutral territory is so converted by a belligerent into a base of operations as to affect the neutral state with responsibility is not so readily answered. An argument placed before the Tribunal of Arbitration at Geneva on behalf of the United States, though empty in the particular case to which it was applied, suggests that the essential elements of the definition of a base possess a wider scope than is usually given to them. In 1865 the *Shenandoah*, a Confederate cruiser, entered Melbourne in need of repairs, provisions, and coal, and with a crew insufficient for purposes of war. She was refitted and provisioned, and obtained a supply of coal, which seems to have enabled her to commit depredations in the neighborhood of Cape Horn on whalers belonging to the United States; her crew having been surreptitiously recruited at the moment of her departure from Port Philip. It was urged on the part of the government of that country that "the main operation of the naval warfare" of the *Shenandoah* having been accomplished by means of the coaling "and other refitment," Melbourne had been converted into her base of operations. The argument was unsound because continued use is above all things the crucial test of a base, both as a matter of fact, and as fixing a neutral with responsibility for acts in themselves innocent or ambiguous. A neutral has no right to infer evil intent from a single innocent act performed by a belligerent armed force; but if he finds that it is repeated several times, and that it has always prepared the way for warlike operations, he may fairly be expected to assume that a like consequence is intended in all cases to follow, and he ought therefore to prevent its being done within his territory. If a belligerent vessel, belonging to a nation having no colonies, carries on hostilities in the Pacific by provisioning in a neutral port, and by returning again and again to it, or to other similar ports, without ever revisiting her own, the neutral country practically becomes the seat of magazines of stores, which though not warlike are necessary to the prolongation of the hostilities waged by the vessel. She obtains as solid an advantage as Russia in a war with France would derive from being allowed to march her troops across Germany. She is enabled to reach her enemy at a spot which would otherwise be unattainable.

That previously to the American Civil War neutral states were not affected by liability for acts done by a belligerent to a further point than that above indicated, there can be no question; but there is equally little question that opinion has moved onwards since that time and the law can hardly be said to have remained in its then state.

The principle upon which the \* \* \* act of issuing from neutral ground for an immediately hostile end is interdicted was laid down by Lord Stowell in a case in which an English frigate lying within Prussian waters sent out its boats to make captures among vessels anchored in the neighboring roads at the entrance of the Dollart.

Hall, pp. 626, 627.

#### Extension of rule.

But the term "base" does not in itself carry any implication as to the importance or number of the operations proceeding from it, and the principle is the same whether an expedition consists of a fleet or of a single ship. Nay, more, the principle is the same for expeditions starting from land or from sea frontiers. The departure of a force from either with belligerent intent is a matter which in every country is reserved for the public authority, and any private person or foreign government which presumes to despatch a force with such an intent usurps that authority, and involves the territorial government which permits such a usurpation in the charge of participating in the war.

Westlake, vol. 2, p. 222.

A difficulty in the practical application of the doctrine as to illegal expeditions has been sometimes felt to arise when the elements of an expedition, such as ships, men and arms, are despatched from a neutral territory separately and are combined outside its limits. It would indeed be difficult to hold that the fact of combination gave a non-commercial character, in violation of neutrality, to something of which the separate elements were all of a merely commercial character; but such a case could scarcely occur in reality. If what results from the combination is a military force inspired by a belligerent intent, it can hardly be but that at least some of its elements must have been despatched from the neutral territory with that intent, so as to give to their despatch an unneutral character which, as we have seen, does not depend on the completeness of the belligerent preparations.

Westlake, vol. 2, 223.

General acceptance has been given to the doctrine that the completion of preparations for an immediate act of hostility is forbidden to belligerents in neutral waters. This interpretation of the received rule would suffice to bring within its prohibitions the assemblage in a neutral bay of a number of torpedo boats prepared to make a sudden dash for a neighboring port belonging to the other belligerent, especially if they stole into the bay or harbor one by one, having picked their way towards it along a neutral coastline. Indeed, it might be argued that any use by belligerent torpedo boats of neutral waters which lay near a hostile line of naval communication was forbidden, since nothing would be easier for them than to make a dash from thence at a passing enemy squadron many miles out at sea.

Lawrence, p. 609.

A belligerent, as we have just seen, is bound not to use neutral territory as a base of operations. \* \* \* it is difficult to resist

the argument that, though continuous use does undoubtedly make a place from which supplies and reinforcements are drawn into a base, yet we cannot go so far as to say that without continuous use there can be no question of any violation of neutrality. It is quite possible for instance, to conceive of a case where the admission into a neutral port of a warlike expedition for the purpose of refitment and coaling would enable it to strike a successful blow at some neighboring possession of the other belligerent. Surely in such circumstances the port would be a base of operations, even though the belligerent flag was seen in it on no other occasion during the war.

\* \* \*

It is suggested that the words should be used to cover cases where acts which neutrals need not prohibit when done to a slight extent or for a short time, have taken place on such a scale or for so long a time as to turn them into occurrences highly beneficial to the belligerent in pursuit of his warlike ends. For instance, a brief visit to a neutral port is quite allowable, but a lengthy stay for purposes of rest and refitment should be forbidden; or a prize may be taken in and kept for a short period, but if the port is filled with prizes and they are left in safety there for an indefinite time, it should be regarded as a base of operations.

Lawrence, p. 618-619.

A neutral must, so far as is in his power, prevent belligerent men-of-war from cruising within his portion of the maritime belt for the purpose of capturing enemy vessels as soon as they leave this belt. It must, however, be specially observed that a neutral is not required to prevent this beyond his power. It is absolutely impossible to prevent such cruising under all circumstances and conditions, especially in the case of neutrals who own possessions in distant parts of the globe.

Oppenheim, vol. 2, p. 401.

On April 16, 1795, Mr. Randolph, Secretary of State sent a circular letter to the Governors of the several states in which he said:

"As it is contrary to the law of nations that any of the belligerent powers should commit hostility on the waters which are subject to the exclusive jurisdiction of the United States, so ought not the ships of war, belonging to any belligerent power, to take a *station in those waters in order to carry on hostile expeditions from thence*. I do myself the honor, therefore, of requesting of your excellency, in the name of the President of the United States, that, as often as a fleet, squadron, or ship, of any belligerent nation, shall clearly and unequivocally use the rivers, or other waters of ——— *as a station, in order to carry on hostile expeditions from thence*, you will cause to be notified to the commander thereof that the President deems such conduct to be contrary to the rights of our neutrality; and that a demand of retribution will be urged upon their government for prizes which may be made in consequence thereof. A standing order to this effect may probably be advantageously placed in the hands of some confidential officer of the militia, and I must entreat you to instruct him to write by the mail to this Department, immediately upon the happening of any case of the kind."

1 Am. State Papers, For. Rel., 608; Moore's Digest, vol. vii, pp. 934, 935.

Nor is it proper to make a convenience in any manner of neutral ports or neutral territory for the purpose of exercising in the vicinity thereof the belligerent right of search or seizure. The capture of a vessel after standing off and on in neutral waters or lying in wait within the same for the purpose, although the capture may have been actually made beyond the jurisdiction of the neutral, might not be recognized as valid.

Instructions of United States Secretary of the Navy, September 23, 1864.

\* \* \* no ship of war or privateer of either belligerent shall be permitted to make use of any port, harbor, roadstead, or other waters within the jurisdiction of the United States as a station or place of resort for any warlike purpose.

Proclamation of President Grant, October 8, 1870. For. Rel. 1870, 48.

See also proclamation of President Roosevelt, February 11, 1904.

The Commander may not use Neutral Territorial Waters as an habitual War Station, whence to sally out with his Ship or Boats and exercise the powers of Visit, Search, or Detention upon Vessels lying beyond the limits of such Waters.

Holland, p. 2.

Article 5, Hague Convention XIII, 1907, is substantially identical with section 125, Austro-Hungarian Manual, 1913.

On July 29, 1863, Mr. Seward, Secretary of State, wrote to the British Minister that Commander Craven, U. S. N., had been instructed by the Secretary of the Navy "that it was not proper to make a convenience, in any manner, of neutral territory for the purpose of exercising the belligerent right of search or capture. A capture of a neutral vessel made after standing off and on a neutral harbor, or mouth of a river, or lying in wait within it for the purpose, although actually made beyond the neutral jurisdiction, would not be recognised as valid, and the right of search can not properly be exercised when it is known previously that, whatever the event of the search, the capture would not be lawful."

Moore's Digest, vol. vii, p. 935.



**SUPPLY BY NEUTRAL POWER TO BELLIGERENT POWER OF WAR-MATERIAL FORBIDDEN.**

**The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.—*Hague Convention XIII, 1907, Article 6.***

No citizen or subject of either of the contracting parties shall take from any Power with which the other may be at war any commission or letter of marque, for arming any vessel to act as a privateer against the other, on pain of being punished as a pirate; nor shall either party hire, lend, or give any part of its naval or military force to the enemy of the other, to aid them offensively or defensively against the other.

Treaty of Amity and Commerce concluded between the United States and Prussia. July 11. 1799, Article XX.

A neutral State which is desirous of remaining on terms of peace and friendship with the belligerents, and of enjoying the rights of neutrality, must abstain from taking any part whatever in the war, by lending military assistance to one or both of the belligerents,  
\* \* \*

Consequently the neutral State cannot, in any manner whatever, put at the disposal of any of the belligerent States, or sell to them its war vessels or military transports, nor material from its arsenals or military stores, for the purpose of assisting it in prosecuting the war.

Institute, 1875, pp. 12, 13.

The principal restriction which the law of nations imposes on the trade of neutrals is the prohibition to furnish the belligerent parties with warlike stores and other articles which are directly auxiliary to warlike purposes.

Kent, vol. 1, p. 142.

**Exception.**

But the neutral duty does not extend so far as to prohibit the fulfilment of antecedent engagements, which may be kept consistently with an exact neutrality, unless they go so far as to require the neutral nation to become an associate in the war. If a nation be under a previous stipulation made in time of peace, to furnish a given number of ships or troops to one of the parties at war, the contract may be complied with, and the state of peace preserved, except so far as the auxiliary forces are concerned.

Kent, vol. 1, p. 123.

**Exception.**

Neutrality may also be modified by antecedent engagements, by which the neutral is bound to one of the parties to the war. Thus the neutral may be bound by treaty, previous to the war, to furnish one of the belligerent parties with a limited succor in money, troops, ships, or munitions of war, or to open his ports to the armed vessels of his ally, with their prizes. The fulfillment of such an obligation does not necessarily forfeit his neutral character, nor render him the enemy of the other belligerent nation, because it does not render him the general associate of its enemy.

How far a neutrality, thus limited, may be tolerated by the opposite belligerent, must often depend more upon considerations of policy than of strict right. Thus, where Denmark, in consequence of a previous treaty of defensive alliance, furnished limited succors in ships and troops to the Empress Catharine II. of Russia, in the war of 1788 against Sweden, the abstract right of the Danish court to remain neutral, except so far as regarded the stipulated succors, was scarcely contested by Sweden and the allied mediating powers. But it is evident, from the history of these transactions, that if the war had continued, the neutrality of Denmark would not have been tolerated by these powers, unless she had withheld from her ally the succors stipulated by the treaty of 1773, or Russia had consented to dispense with its fulfillment.

Dana's Wheaton, pp. 517-518.

The progress of modern times has been towards insisting on entire and impartial neutrality. It is difficult to conceive now of a State being permitted to continue a condition of limited and partial neutrality. A belligerent would be justified in treating any State as an enemy throughout, which rendered any aid to its enemy, whether in pursuance of treaty obligations or not, or which gave or withheld belligerent privileges unequally.

Note 203, Dana's Wheaton.

\* \* \* it is a violation of neutrality for a neutral State to supply troops. \* \* \*

Woolsey, p. 275.

The general principle that a mercantile act is not a violation of a state neutrality, is pressed too far when it is made to cover the sale of munitions or vessels of war by a State. Trade is not one of the common functions of a government; and an extraordinary motive must be supposed to stimulate an extraordinary act. The nation is exceptionally unfortunate which is forced to get rid of surplus stores precisely at the moment when their purchase is useful to a belligerent.

Hall, p. 621.

In the year 1825, the Swedish government, wishing to reduce its navy, offered six frigates for sale to the government of Spain. The latter refused to buy, and three of them were then sold to an English mercantile firm, who, as it afterwards appeared, were probably acting on behalf of Mexico, then in revolt against the mother country. In any case it became known before the vessels were handed over that a further sale had been or was about to be effected to the recog-

nised Mexican agent in England; and the Swedish government, listening to the warmly expressed complaints of Spain, rescinded the contract at some monetary loss to itself, notwithstanding that the ships had been sold in ignorance of their ultimate destination. During the war between France and Prussia, the government of the United States seems to have taken an opposite view of its duty; but there can be no question that Sweden, in yielding, chose the better part. The vendor of munitions of war in large quantities during the existence of hostilities knows perfectly well that the purchaser must intend them for the use of one of the belligerents, and a neutral government is too strictly bound to hold aloof from the quarrel to be allowed to seek safety in the quibble that the precise destination of the articles bought has not been disclosed.

Hall, p. 621, 622.

In January of the present year the Chilean Congress is reported to have refused to accept a very high price offered by an American firm for six war ships, doubtless believing that the ships were destined for either Russia or Japan. A new, though cognate, question has, however, been raised by the sale of certain German liners to Russia, which forthwith, after rechristening, commissioned them as armed cruisers. If these vessels were, as is alleged, subsidized by their own Government, with a view to their employment by that Government in case of need, it has been urged with much force that they practically form part of the reserve of the imperial German navy, and that, therefore, Germany being neutral, they could not be lawfully sold to a belligerent.

Holland, Neutral Duties in a Maritime War, Proceedings of the British Academy, II, 2.

It is a grave offense against the law of nations for a neutral government to sell a man-of-war to a belligerent.

Moore's Digest, vol. vii, p. 868; Mr. Day, Secretary of State, to Mr. Hay, ambassador to England, June 25, 1898; Mr. Moore, Acting Secretary of State, to Mr. Hay, June 26, 1898.

It was stated that the Ecuadorean Government had suspended the Ecuadorean consul-general at New York from the performance of his official functions till he should prove himself innocent of certain charges brought against him in connection with the transfer, during the war between China and Japan, of the Chilean man-of-war *Esmeralda* to Japan in an Ecuadorean port and under the Ecuadorean flag.

Moore's Digest, vol. vii, p. 871; Mr. Uhl, Acting Secretary of State, to the governor of New York, February 5, 1895.

And to this it must be added that since a well governed state does not perform commercial acts except incidentally to the performance of its public duties, as in the sale of old stores, abstinence from such acts is not such a burden to it as any unfairly demanded abstinence from them would be to private persons to whom they are their living. It would therefore be highly objectionable, as an unfriendly proceeding, that a public authority should sell arms or ammunition, or lend money, to a belligerent, even when such sale or loan was within

its usual course, and could not be regarded as a participation in a specific operation of war.

Westlake, vol. 2, p. 206.

Another duty laid on neutral states is to abstain from \* \* \* *giving or selling instruments and munitions of war, to either belligerent.* \* \* \* With regard to the gift or sale of war material the duty of a neutral state is equally clear. The Second Hague Conference summarized accepted law in the words, "The supply in any manner, directly or indirectly, by a neutral power to a belligerent power, of warships, ammunition, or war material of any kind whatever, is forbidden." But it is to be noted that, when two powers are at peace, either is quite free to sell a war-ship to the other. Thus the purchase at the end of 1903, by Japan from Argentina of the two powerful cruisers afterwards called the *Nisshin* and the *Kasuga* was perfectly legal, because the transaction was completed before the outbreak of the war with Russia early in 1904. But had hostilities commenced before the negotiations were finished, the Argentine government would have been bound to refuse delivery till after the conclusion of peace.

Lawrence, 631-632.

The question whether a neutral government is under an obligation to discontinue public sales by auction of old warlike stores because belligerent agents are likely to purchase them, was raised in 1870, when France bought largely at American sales during her war with Germany. A committee of the United States Senate reported in favor of the action of the executive. But the subsequent growth of opinion has been in the direction of greater carefulness, and in all probability a different course would be pursued were the circumstances to recur. Indeed, the wording of the Hague Article quoted above seems decisive. It forbids the supply of such things as we are considering "indirectly" as well as "directly"; and there can be no doubt that a large proportion of the cannon and rifles sent from New York to France in 1870 came indirectly through the hands of agents from the stores of the American government.

Lawrence, p. 632.

However, the question is controversial as to whether a neutral State, which in time of peace concluded a treaty with one of the belligerents to furnish him in case of war with a limited number of troops, would violate its neutrality by fulfilling its treaty obligation. Several writers have answered the question in the negative, and there is no doubt that during the eighteenth century such cases happened. But no case happened during the nineteenth century, and there ought to be no doubt that nowadays the answer must be in the affirmative, since a qualified neutrality is no longer admissible.

Oppenheim, vol. 2, p. 389.

As regards furnishing men-of-war to belligerents, the question arose during the Russo-Japanese War as to whether a neutral violates his duty of impartiality by not preventing his national steamship companies from selling to a belligerent such of their liners as are destined in case of war to be incorporated as cruisers in the national navy. The question was discussed on account of the sale to Russia

of the *Augusta Victoria* and the *Kaiserin Maria Theresa* by the North German Lloyd, and the *Fürst Bismarck* and the *Columbia* by the Hamburg-American Line, vessels which were at once enrolled in the Russian Navy as second-class cruisers, re-named as the *Kuban*, *Ural*, *Don*, and *Terek*. Had these vessels, according to an arrangement with the German Government, really been auxiliary cruisers to the German Navy, and had the German Government given its consent to the transaction, a violation of neutrality would have been committed by Germany. But the German Press maintained that these vessels had not been auxiliary cruisers to the Navy, and Japan did not lodge a protest with Germany on account of the sale. If these liners were not auxiliary cruisers to the German Navy, their sale to Russia was a legitimate sale of articles of contraband.

Oppenheim, vol. 2, p. 389-390.

The duty of impartiality must prevent a neutral from supplying belligerents with arms, ammunition, vessels, and military provisions. And it matters not whether such supply takes place for money or gratuitously. \* \* \* This is a settled rule so far as direct transactions regarding such supply between belligerents and neutrals are concerned. The case is different where a neutral does not directly and knowingly deal with a belligerent, although he may, or ought to, be aware that he is indirectly supplying a belligerent. Different States have during neutrality taken up different attitudes regarding such cases. \* \* \* On the other hand, the Government of the United States of America, in pursuance of an Act passed by Congress in 1868 for the sale of arms which the end of the Civil War had rendered superfluous, sold in 1870, notwithstanding the Franco-German War, thousands of arms and other war material which were shipped to France. This attitude of the United States is now generally condemned, and article 6 of Convention XIII. may be quoted against a repetition of such a practice on the part of a neutral State.

Oppenheim, vol. 2, p. 426-427.

A neutral State can support no belligerent by furnishing military resources of any kind whatsoever.

German War Book, p. 191.

Article 6, Hague Convention XIII, 1907, is substantially identical with section 126, Austro-Hungarian Manual, 1913.

#### LOANS OF MONEY.

\* \* \* it is a violation of neutrality for a neutral state to lend money.

Woolsey, International Law, 6th ed., p. 275.

Since money is truly described as the sinews of war, and it is no part of the business of a state to deal in money, its loan by a neutral state to a belligerent would necessarily have a special character, not only as aiding the latter in fact but also as disclosing an intent to aid him in his war. It would therefore be an unneutral act. If by the law of the neutral state the consent of the executive is required to loans by individuals to foreign powers, or if the executive is in the habit of practically controlling such operations by the exercise of its

influence, a loan by individuals to a belligerent which is allowed to slip through the meshes will have an international character not distinguishable from a loan by the state. But in countries where, as in England, the loan market is free in time of peace, the question arises whether the state is bound to interfere with it in time of war by a prohibition to lend to belligerents. In such a country loans to foreign states are not political but commercial acts, falling within the daily habits of persons engaged in business, not implying any intent by those persons as to the use to be made of the money by the governments assisted, and such that to prevent them just when the greatest profit is likely to be obtained from them would be felt to be an onerous interposition. They do not constitute a participation in any specific operation of war, nor is the branch of business to which they belong reserved for public action by the general understanding of the civilised world. Tried therefore by the tests which have been suggested as imposed by the theory of neutrality, loans by neutral individuals to belligerent states must be pronounced legitimate, and such they are in fact held to be.

Westlake, vol. 2, pp. 251, 252.

With reference to the loan of money which was solicited from the United States by the French Government, in 1798, through the American envoys in Paris, the United States took the ground that such a loan would be a violation of neutrality. This is cited with approval by Chancellor Kent.

Moore's Digest, vol. vii, p. 978; Mr. Pickering, Secretary of State, to Messrs. Pinckney, Marshall, and Gerry, March 23, 1798, Am. State Papers, For. Rel. II, 200.

In 1816 Colonel Devereux, commercial agent of the United States at Buenos Ayres, presented a memorial to the Government at that place offering his services to procure for its use a loan in the United States under the guarantee of the United States Government. His proposition was sent to the Congress at Tucuman, and, after receiving its sanction, was agreed to by the supreme director and assisting members of the Congress at Buenos Ayres. The action of Colonel Devereux, though his intentions were not questioned, was disavowed, and Mr. Worthington, the agent of the United States in South America, was instructed to inform the Government of Buenos Ayres that the refusal of the United States to carry out the arrangement which was sought to be made "must be the result of its existing laws and duties in relation to the civil war between Spain and the Spanish American colonies."

Moore's Digest, vol. vii, pp. 978, 979; Mr. Brent, Acting Secretary of State, to Mr. Worthington, April 21, 1817, 2 MS. Desp. to Consuls, 24.

OBLIGATION OF NEUTRAL TO PREVENT FITTING OUT OR ARMING OF HOSTILE VESSEL AS  
WELL AS DEPARTURE OF VESSEL SO FITTED OUT OR ARMED.

**A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.—*Hague Convention XIII, 1907, Article 8.***

Furthermore, the neutral State is bound to exercise vigilance to prevent other persons from placing war vessels at the disposal of any of the belligerent States in its ports or in those portions of the sea subject to its jurisdiction.

When the neutral State is aware of enterprises or acts of this kind, incompatible with neutrality, it is bound to take the necessary measures to prevent them, and to prosecute the individuals who violate the duties of neutrality, as the guilty parties.

Institute, 1875, p. 13.

The government of the United States was warranted by the law and practice of nations, in the declarations made in 1793, of the rules of neutrality, which were particularly recognized as necessary to be observed by the belligerent powers, in their intercourse with this country. These rules were, that the original arming or equipping of vessels in our ports, by any of the powers at war, for military service, was unlawful; and no such vessel was entitled to an asylum in our ports. The equipment by them of government vessels of war, in matters which, if done to other vessels, would be applicable equally to commerce or war, was lawful. The equipment by them of vessels fitted for merchandise and war, and applicable to either, was lawful; but if it were of a nature solely applicable to war, it was unlawful.

Kent, vol. 1, p. 129-130.

The testimony of these [Wolffius and Vattel] and other writers on the law and usage of nations was sufficient to show, that the United States, in prohibiting [in 1793] all the belligerent powers from equipping, arming, and manning vessels of war in their ports, had exercised a right and a duty with justice and moderation.

Dana's Wheaton, p. 533.

These duties of neutrality extend not only to preventing the arming of cruisers in neutral ports, and the enlistment of men in neutral territory, but also to the general sanctity of neutral jurisdiction, by redressing all injuries which one belligerent may commit upon the other within its limits.

Halleck, p. 516.

At the commencement of the European war, in 1793, the government of the United States took strong grounds against the arming and equipping of vessels within the ports of the United States, by the respective belligerent powers, to cruise against each other, declaring such acts to be a violation of neutral rights, and positively unlawful; and that any vessel, so armed or equipped in our ports, for military service, was not entitled to the rights of asylum. The authority of Wolfius, Vattel and other writers on the law and usage of nations, were appealed to, in support of these declarations and rules of neutrality. The ground then assumed by the United States is now generally admitted to be correct.

Halleck, pp. 524-525.

Illegal equipment and outfit, in violation of neutral immunity, will not affect the validity of captures made after the cruise, to which the outfit, had been applied is actually terminated. The offense is deemed to be deposited at the termination of the voyage, and does not affect future transactions. This rule would result from analogy to other cases of violation of public law, and has been directly announced by the U. S. supreme court.

Halleck, pp. 533-534, *The Santissima Trinidad*, 7 Wheaton, 348.

\* \* \* It is a violation of neutrality, for a neutral state \* \* \* to suffer its subjects to prepare, or to aid in preparing or augmenting, any hostile expedition against a friendly power, as for instance to build, arm, or man ships of war with such a purpose in view, or to build them with this intent so far as to make them ready for an armament to be put on board upon the high-seas or in some neutral port.

Woolsey, p. 275.

It was formerly thought that the neutral might allow \* \* \* the preparation of hostile expeditions in his harbors, if he granted the same to both sides. All now admit that the neutral ought to refuse any of these privileges, and must be the sole judge in the case.

Woolsey, pp. 278, 279.

The distinction between fitting out and arming ships of war for the service of a belligerent, which is not permissible, and selling to such belligerent ships to be converted into men-of-war and munitions of war, which is permissible, may be thus explained: It is not indictable for a gunsmith to sell a pistol to a party who may use it unlawfully, even though the vendor may have reasons to suspect the object of the purchase. It would, however, be unlawful for the gunsmith to join in arranging a machine by which a specific unlawful purpose is to be achieved. It is not unlawful, in other words, to be concerned in preparations which will not, unless diverted by an independent force, produce a violation of law. It is, however, unlawful



to be concerned in putting in actual operation dangerous machines. He who is concerned in fitting out and arming a man-of-war for the purpose of preying on the commerce of a friendly state, or of attacking its armed ships or ports, is as much concerned in the attack as he who takes part in manufacturing and planting a torpedo in a frequented channel is responsible for the mischief done by the torpedo. This distinction has been already asserted in the cases which rule that it is an indictable offense to be concerned in counseling and aiding a specific attack, but not an indictable offense to be concerned in selling arms by which such attack is to be made.

Wharton, *Int. Law Digest*, vol. 3, p. 525.

The evidence tending to show that general opinion already looked upon the outfit and manning of cruisers by private persons as compromising the neutrality of a state, mainly consists in the neutrality edicts which were issued shortly after this time [1777] on the outbreak of actual war between England and France. Venice, Genoa, Tuscany, the Papal States, and the Two Sicilies, subjected any person arming vessels of war or privateers in their ports to a fine; and in 1779 the States-General of the United Provinces issued a placard reciting that it was suspected that subjects of the state had equipped and placed on the sea armed vessels under a belligerent flag, and declaring such 'conduct to be contrary to the law of nations, and to the duties binding on subjects of a neutral power'.

Hall, p. 613.

The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main however it is identical with the standard of conduct which is now adopted by the community of nations.

Hall, p. 616.

It has been proposed to stretch the liability of a neutral sovereign so as to make him responsible for the ultimate effect of two independent acts done within his jurisdiction, each in itself innocent, but intended by the persons doing them to form part of a combination having for its object the fitting out of a warlike expedition at some point outside the neutral state. The argument upon which this proposal rests has been shortly stated as follows:

'The intent covers all cases, and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory—whether acts of building, fitting, arming, or of procuring materials for those acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise.'

In accordance with this view, it was contended on the part of the United States before the Tribunal of Arbitration at Geneva that the Alabama and Georgia, two vessels in the Confederate service, were in effect 'armed within British jurisdiction.' The Alabama left

Liverpool wholly unarmed on July 29, 1862, and received her guns and ammunition at Terceira, partly from a vessel which cleared a fortnight later from Liverpool for Nassau in the Bahamas, and partly from another vessel which started from London with a clearance for Demerara. In like manner the Georgia cleared from Glasgow for China, and received her armament off the French coast from a vessel which sailed from New Haven in Sussex.

The intent of acts, innocent separately, but rendered by this theory culpable when combined, can only by their nature be proved when the persons guilty of them are no longer within neutral jurisdiction. They cannot therefore be prevented by the state which is saddled with responsibility for them; and this responsibility must mean either that the neutral state will be held answerable in its own body for injury suffered by the belligerent, in which case it will make amends for acts over which it has had no control, or else that it is bound to exact reparation from the offending belligerent, at the inevitable risk of war.

If this doctrine were a legal consequence of the accepted principles of international law it might be a question whether it would not be wise to refuse operation to it on the ground of undue oppressiveness to the neutral. But no such difficulty arises; for, as responsibility is the correlative of power, if a nation is to be responsible for innocent acts which become noxious by combination in a place outside its boundaries, it must be enabled to follow their authors to the place where the character of the acts becomes evident, and to exercise the functions of sovereignty there. But even on the high seas it is not permissible for a non-belligerent state to assume control over persons other than pirates or persons on board its own ships; and within foreign territory it has no power of action whatever.

The true theory is that the neutral sovereign has only to do with such overt acts as are performed within his own territory, and to them he can only apply the test of their immediate quality. If these are such in themselves as to violate neutrality or to raise a violent presumption of fraud, he steps in to prevent their consequences; but if they are presumably innocent, he is not justified in interfering with them. If a vessel in other respects perfectly ready for immediate warfare is about to sail with a crew insufficient for fighting purposes, the neutral sovereign may reasonably believe that it is intended secretly to fill up the complement just outside his waters. Any such completion involves a fraudulent use of his territory, and an expectation that it is intended gives him the right of taking precautions to prevent it. But no fraudulent use takes place when a belligerent in effect says: I will not compromise your neutrality, I will make a voyage of a hundred miles in a helpless state, I will take my chance of meeting my enemy during that time, and I will organise my expedition when I am so far off that the use of your territory is no longer the condition of its being.

Hall, pp. 631-634.

It is somewhat difficult to determine under what obligations a neutral state lies with respect to vessels of war and vessels capable of being used for warlike purposes, equipped by or for a belligerent within its dominions.

1. Is the mere construction and fitting out, in such manner that they shall be capable of being used by him for warlike purposes, an international offence? or,

2. Is such construction to be looked upon as an act of legitimate trade; and is it necessary, to constitute an international offence, that some further act shall be done, so as to make such vessels elements in an expedition?

The direct logical conclusions to be obtained from the ground principles of neutrality go no further than to prohibit the issue from neutral waters of a vessel provided with a belligerent commission, or belonging to a belligerent and able to inflict damage on his enemy. A commission is conclusive evidence as to the fact of hostile intent; and in order to satisfy the alternative condition it is not necessary that the ship shall be fully armed or fully manned. A vessel intended to mount four guns and to carry a crew of two hundred men would be to an unarmed vessel sufficiently formidable with a single gun and half its complement of seamen. But to possess any force at all, it must possess a modicum of armament, and it must have a crew sufficient at the same time to use that armament and to handle the ship. If then the vessel seems at the moment of leaving the neutral port to fulfil these conditions, the neutral must, judging from the facts, infer a hostile intent, and prevent the departure of the expedition.

On the other hand, it is fully recognised that a vessel completely armed, and in every respect fitted the moment it receives its crew to act as a man of war, is a proper subject of commerce. There is nothing to prevent its neutral possessor from selling it, and undertaking to deliver it to the belligerent either in the neutral port or in that of the purchaser, subject to the right of the other belligerent to seize it as contraband if he meets it on the high seas or within his enemy's waters. 'There is nothing,' says Mr. Justice Story, 'in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit.' If the neutral may sell his vessel when built, he may build it to order; and it must be permissible, as between the belligerent and the neutral state, to give the order which it is permissible to execute. It would appear therefore, arguing from general principles alone, that a vessel of war may be built, armed, and furnished with a minimum navigating crew, and that in this state, provided it has not received a commission, it may clear from a neutral harbour on a confessed voyage to a belligerent port without any infraction of neutrality having been committed.

The question remains, Is there a special usage with respect to the building and fitting out of ships which abridges the common law privileges of neutrals?

It has been already mentioned that in 1779 the neutrality edicts of various minor Italian States rendered it penal to sell, build, or arm privateers or vessels of war for any of the then belligerents; and a like provision occurs in the Austrian ordinances of 1803.

In 1793 the instructions issued to the collectors of customs of the United States professed, according to an accompanying memorandum, to mark out the boundaries of neutral duty as then understood by the American government. And though Washington, in a speech to Congress, took the narrower ground that in the then posture of

affairs he had resolved to 'adopt general rules which should conform to the treaties and assert the privileges of the United States,' the wider language of the memorandum should probably be preferred. The first paragraph declares 'that the original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive, is deemed unlawful;' and the seventh adds that 'equipments of vessels in the ports of the United States which are of a nature solely adapted to war are deemed unlawful.' These regulations, besides forbidding the original arming and equipping of vessels by a belligerent, prohibit the reception of any warlike equipment by vessels already belonging to him: but they do not specify as illegal the building and arming of a vessel intended to be delivered outside neutral territory, but not belonging to a belligerent at the moment of exit, although built to his order. The Neutrality Act of the United States went further, and made it penal to fit out and arm or procure to be fitted out and armed, &c., any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign state to cruise or commit hostilities against the subjects, &c., of another state with which the United States shall be at peace. For some time the policy of the United States was in strict accordance with their municipal law; and subsequently they have at least expected the conduct of other nations to be in conformity with its requirements; it must therefore be supposed to continue to embody what are to their view international duties.

England has also retained a Foreign Enlistment Act for many years upon her Statute Book, and she has lately strengthened its provisions after full warning of the manner in which municipal laws may be employed to damnify the position of a nation in international controversy.

Finally, Great Britain and the United States have agreed that they will for the future 'use due diligence to prevent the fitting out, arming, or equipping within the jurisdiction' of the contracting power 'of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.' As the respective governments of the two countries are not agreed on the true meaning of this language, it is useless to speculate as to the effect which might be given to the provisions of the Treaty of Washington during any future war in which either Great Britain or the United States is a belligerent, the other of the two being neutral.

In France no special law exists forbidding the construction or outfit of vessels of war, but all persons exposing the state to reprisals or to a declaration of war are liable to punishment under the Penal Code, which leaves the state to accommodate its rules to international law existing for the time being; and in 1861, on the outbreak of the American Civil War, a Proclamation of Neutrality was issued, referring to the appropriate articles of the Code, and prohibiting all French subjects from "assisting in any way the equipment or armament of a vessel of war or privateer of either of the two parties." Under this proclamation six vessels which were in course of

construction in French ports for the Confederate States were arrested.

In 1864 the Danish war gave occasion to Italy for the adoption of a like rule; and in 1866 the government of the Netherlands for the first time 'undertook to see that the equipment of vessels of war intended for the belligerent parties should not take place in the ports of the Netherlands.' The codes of Austria, Spain, Portugal, and Denmark prohibit any one to procure arms, vessels, or munitions of war for the service of a foreign power. The intention may have been to prevent the issue of privateers, but the language would no doubt restrain the construction of vessels for belligerent use. No nation except England and the United States has gone further than to prohibit the armament of a vessel fitted solely for fighting purposes.

A comparison of international custom with the logical results of the unquestioned principles of neutrality seems then to lead to these conclusions:

1. That an international usage prohibiting the construction and outfit of vessels of war, in the strict sense of the term, is in course of growth, but that although it is adopted by the most important maritime powers, it is not yet old enough or quite wide enough to have become compulsory on those nations which have not yet signified their voluntary adherence to it.

2. That in the meantime a ship of war may be built and armed to the order of a belligerent, and delivered to him outside neutral territory ready to receive a fighting crew; or it may be delivered to him within such territory, and may issue as belligerent property, if it is neither commissioned nor so manned as to be able to commit immediate hostilities, and if there is not good reason to believe that an intention exists of making such fraudulent use of the neutral territory as has been before indicated.

That the usage which is in course of growth extends the duties of a neutral state into new ground is plain; but it does not follow that the extension is either unhealthy or unnecessary. Though an armed ship does not differ in its nature from other articles merely contraband of war, it does differ from all in the degree in which it approaches to a completed means of attacking an enemy. The addition of a few trained men to its equipage, and of as much ammunition as can be carried in a small coasting vessel, adapts it for immediate use as part of an organised whole of which it is the most important element. The same cannot be said of any other article of contraband. It is neither to be expected nor wished that belligerent nations should be patient of the injury which would be inflicted upon them by the supply of armed vessels to their enemies as mere contraband of war.

But it is much to be hoped that the rule will not retain the indefiniteness which attaches to it in its present inchoate form. In planting their doctrine upon the foundation of the intent of the neutral trader, or of the agent of the offending belligerent in the neutral country, instead of upon the character of the ship itself, jurists appear hardly to have realised how unimportant is the advantage which is given to the injured belligerent in comparison with the grave evils of an indefinite increase in the number of international

controversies. Experts are perfectly able to distinguish vessels built primarily for warlike use; there would therefore be little practical difficulty in preventing their exit from neutral ports, and there is no reason for relieving a neutral government from a duty which it can easily perform. But it is otherwise with many vessels primarily fitted for commerce. Perhaps few fast ships are altogether incapable of being so used as to inflict damage upon trade; and there is at least one class of vessels which on the principles urged by the government of the United States in the case of the *Georgia* might fix a neutral state with international responsibility in spite of the exercise by it of the utmost vigilance. Mail steamers of large size are fitted by their strength and build to receive, without much special adaptation, one or two guns of sufficient caliber to render the ships carrying them dangerous cruisers against merchantmen. These vessels, though of distinct character in their more marked forms, melt insensibly into other types, and it would be impossible to lay down a rule under which they could be prevented from being sold to a belligerent and transformed into constituent parts of an expedition immediately outside neutral waters without paralysing the whole ship-building and ship-selling trade of the neutral country.

Hall, pp. 634-640.

When a ship or a cargo of arms is despatched by a neutral owner in search of a market, his motive is the expectation that it will find a belligerent purchaser who will use it in war, but the intent so to use it can only be formed by the purchaser, and remains contingent as long as the expectation exists, so that the expectation is not an assistance knowingly given to it. But when a ship is despatched from a neutral port by a belligerent owner, his intent to employ her in war has been formed while she was still in neutral territory, so that her despatch is an act of war and a usurpation of the neutral state's authority, and any one who has contracted with the belligerent owner or worked for him about the ship with knowledge of his intent has identified himself with it. Thus the line between the export of contraband and the abuse of neutral territory is drawn by the intent of unneutral employment, formed within the territory by a person whose position in relation to the thing enables him to give effect to it. \* \* \*

If the government has reasonable ground to believe that a culpable intent exists, it must not wait idly till the proof of it would satisfy a court of law, or it will be likely to have stirred itself too late, and it should therefore arm itself with the powers necessary for acting in time.

Westlake, vol. 2, pp. 213, 214, 220.

Sir Alexander Cockburn, as the British arbitrator in the *Alabama* case, said that "it is the present intention of the immediate employment of the vessel for hostile purposes which makes the sending out an armed ship an offence against the law of nations." The word "immediate" marks the difference between that view and the view adopted in the rule [the first of the three so-called *Alabama* rules]; and on the same principle, which was that of the deciding half of the court of Exchequer in the case of the *Alexandra*, Sir Alexander required officers and a fighting crew, equipment and armament, for

a ship the departure of which should constitute the offence. But with this view we cannot agree. No international attempt to lay down a precise rule is in favour of it, and in the absence of a precise rule generally agreed on a belligerent has the right to fall back on the fundamental principles of the subject, which raise no question of limit or degree when pointing out that a neutral who permits a belligerent to receive an augmentation of naval strength within his territory is a participant in the war.

Westlake, vol. 2, pp. 219, 220.

And the duty extends to private persons who endeavor to fit out such expeditions on their own responsibility, as well as to the belligerent state and its avowed agents. It also covers single ships. They are treated as warlike expeditions, if they are adapted for warlike uses and prepared for the purpose of making war in the interests of one belligerent against the other. In that case the neutral government is under an obligation to detain them. An instance of the strict observance of this obligation which is now common is to be found in the action of the British government with regard to the *Somers*, a torpedoboat under construction in England when the Hispano-American War broke out in May, 1898. It had been purchased by the United States about two months before, and in consequence its departure from British jurisdiction was prohibited.

Lawrence, p. 636-637.

These clauses [of Article 8, Hague Convention XIII, 1907] bristle with contentious matter. They adopt the test of intent, which it is exceedingly difficult to apply. They leave the phrase "fitting out" unexplained. They do not say whether "arming" requires an armament so complete that the vessel is ready to commence hostilities at once, or whether the reception on board of a few weapons would be sufficient. These and other questions for years vexed the peace of Great Britain and the United States in the long controversy which arose over the proceedings of the *Alabama* and her sister cruisers. Problems similar to them will no doubt arise in future, and in addition the position of fleet auxiliaries, such as colliers and repairships, will have to be seriously considered. When the time comes we may hope an International Prize Court will be in existence and ready to give them an authoritative solution.

Lawrence, p. 637.

\* \* \* if a subject of a neutral builds armed ships to order of a belligerent, he prepares the means of naval operations, since the ships on sailing outside the territorial waters of the neutral and taking in a crew and ammunition can at once commit hostilities. Thus, through carrying out the order of the belligerent, the neutral territory concerned has been made the base of naval operations. And as the duty of impartiality includes the obligation of the neutral to prevent either belligerent from making neutral territory the base of military or naval operations, a neutral violates his neutrality by not preventing his subjects from carrying out an order of a belligerent for the building and fitting out of men-of-war.

Oppenheim, vol. 2, p. 405-406.

Whereas a neutral is in no wise obliged by his duty of impartiality to prevent his subjects from selling armed vessels to the belligerents, such armed vessels being merely contraband of war, a neutral is bound to employ the means at his disposal to prevent his subjects from building, fitting out, or arming, to the order of either belligerent, vessels intended to be used as men-of-war, and to prevent the departure from his jurisdiction of any vessel which, by order of either belligerent, has been adapted to warlike use.

Oppenheim, vol. 2, p. 405.

The movement for recognition of the fact that the duty of impartiality requires a neutral to prevent his subjects from building and fitting out to order of belligerents vessels intended for naval operations, began with the famous case of the *Alabama*. It is not necessary to go into all the details of this case. It suffices to say that in 1862, during the American Civil War, the attention of the British Government was drawn by the Government of the United States to the fact that a vessel for warlike purposes was built in England to order of the insurgents. This vessel, afterwards called the *Alabama*, left Liverpool in July 1862 unarmed, but was met at the Azores by three other vessels, also coming from England, which supplied her with guns and ammunition, so that she could at once begin to prey upon the merchantmen of the United States. On the conclusion of the Civil War, the United States claimed damages from Great Britain for the losses sustained by her merchant marine through the operations of the *Alabama* and other vessels likewise built in England. Negotiations went on for several years, and finally the parties entered, on May 8, 1871, into the Treaty of Washington for the purpose of having their difference settled by arbitration, five arbitrators to be nominated—Great Britain, the United States, Brazil, Italy, and Switzerland, each choosing one. The treaty contained three rules, since then known as “The Three Rules of Washington,” to be binding upon the arbitrators, namely:—

“A neutral Government is bound—

“*Firstly*. To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a Power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part, within such jurisdiction, to warlike use.

“*Secondly*. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

“*Thirdly*. To exercise due diligence in its waters, and as to all persons within its jurisdiction, to prevent any violations of the foregoing obligations and duties.”

In consenting that these rules should be binding upon the arbitrators, Great Britain expressly declared that, in spite of her consent, she maintained that these rules were not recognised rules of International Law at the time when the case of the *Alabama* occurred, and the treaty contains also the stipulation that the parties—



"Agree to observe these rules as between themselves in future, and to bring them to the knowledge of other Maritime Powers, and to invite them to accede to them."

The appointed arbitrators met at Geneva in 1871, held thirty-two conferences there, and gave decision on September 14, 1872, according to which England had to pay 15,500,000 dollars damages to the United States.

The arbitrators put a construction upon the term *due diligence* and asserted other opinions in their decision which are very much contested and to which Great Britain never consented. Thus, Great Britain and the United States, although they agreed upon the three rules, did not at all agree upon the interpretation thereof, and they could, therefore, likewise not agree upon the contents of the communication to other maritime States stipulated by the Treaty of Washington. It ought not, therefore, to be said that the Three Rules of Washington have literally become universal rules of International Law. Nevertheless, they were the starting-point of the movement for the universal recognition of the fact that the duty of impartiality obliges neutrals to prevent their subjects from building and fitting out, to order of belligerents, vessels intended for warlike purposes, and to prevent the departure from their jurisdiction of any vessel, which, by order of a belligerent, has been adapted to warlike use. Particular attention must be paid to the fact that, although article 8 of Convention XIII. in other respects copies almost verbally the first of the Three Rules of Washington, it differs from it in so far as it replaces the words "to use due diligence" by "to employ the means at its disposal." For this reason the construction put by the Geneva arbitrators upon the term *due diligence* cannot find application to the rule of article 8, the employment of the means at the disposal of a neutral to prevent the acts concerned being a mere question of fact.

Oppenheim, vol. 2, pp. 406-409; Moores Dig., Vol. VII, sec. 1330; Moore's Int. Arb., Vol. I, pp. 495-632 and 653-659; Phillimore, III, sec. 151; Annuaire, I (1877), p. 139.

#### British laws.

8. If any person within Her Majesty's dominions, without the licence of Her Majesty, does any of the following acts; that is to say:

(1.) Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State: or

(2.) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State: or

(3.) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State: or

(4.) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; such person shall

be deemed to have committed an offence against this Act, and the following consequences shall ensue:

(1.) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2.) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty: provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following (that is to say):

(1.) If forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State:

(2.) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the licence of Her Majesty until the termination of such war as aforesaid.

9. Where any ship is built by order of or on behalf of any foreign State, when at war with a friendly State, or is delivered to or to the order of such foreign State, or any person who to the knowledge of the person building is an agent of such foreign State, or is paid for by such foreign State or such agent, and is employed in the military or naval service of such foreign State, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign State.

British Foreign Enlistment Act, 1870, secs. 8 and 9.

#### British laws.

If any person within the limits of Her Majesty's dominions, and without the licence of Her Majesty,

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue:

(1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

British Foreign Enlistment Act, 1870, sec. 11.

**Laws of the United States.**

Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the use of the United States.

Sec. 5283, Revised Statutes.

**Laws of the United States.**

[The district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.] In every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot, contrary to the provisions and prohibitions of this Title; and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, it shall be lawful for the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to the execution of the prohibitions and penalties of this Title, and to the restoring of such prizes in the cases in which restoration shall be adjudged; and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign prince or state or of any colony, district, or people with whom the United States are at peace.

Sec. 5287, Revised Statutes.

**Laws of the United States.**

The owners or consignees of every armed vessel sailing out of the ports of the United States, belonging wholly or in part to citizens

thereof, shall, before clearing out the same, give bond to the United States, with sufficient sureties, in double the amount of the value of the vessel and cargo on board, including her armament, conditioned that the vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace.

Revised Statutes, Sec. 5289.

#### **Laws of the United States.**

The several collectors of the customs shall detain any vessel manifestly built for warlike purposes, and about to depart the United States, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances, render it probable that such vessel is intended to be employed by the owners to cruise or commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace until the decision of the President is had thereon, or until the owner gives such bond and security as is required of the owners of armed vessels by the preceding section.

Revised Statutes, sec. 5290.

#### **Effect of armistice.**

Shortly after I had entered upon the discharge of the executive duties I was apprized that a war steamer belonging to the German Empire was being fitted out in the harbor of New York with the aid of some of our naval officers rendered under the permission of the late Secretary of the Navy. This permission was granted during an armistice between that Empire and the Kingdom of Denmark, which had been engaged in the Schleswig-Holstein war. Apprehensive that this act of intervention on our part might be viewed as a violation of our neutral obligations incurred by the treaty with Denmark and of the provisions of the act of Congress of the 20th of April, 1818, I directed that no further aid should be rendered by any agent or officer of the Navy; and I instructed the Secretary of State to apprise the minister of the German Empire accredited to this Government of my determination to execute the law of the United States and to maintain the faith of treaties with all nations. The correspondence which ensued between the Department of State and the minister of the German Empire is herewith laid before you. The execution of the law and the observance of the treaty were deemed by me to be due to the honor of the country, as well as to the sacred obligations of the Constitution. I shall not fail to pursue the same course should a similar case arise with any other nation. Having avowed the opinion on taking the oath of office that in disputes between conflicting foreign governments it is our interest not less than our duty to remain strictly neutral, I shall not abandon it. You will perceive from the correspondence submitted to you in connection with this subject that the course adopted in this case has been properly-regarded by the belligerent powers interested in the matter.

Annual message of President Taylor, December 4, 1849, Richardson's Messages of the Presidents, p. 10.

In 1848, the opinion of the Attorney General was asked upon the question of whether a violation of the neutrality laws of the United States would be committed by the purchasing and fitting out in the port of New York, of a war vessel for the Prussian government, there being then an armistice in the warfare between Prussia and Denmark. It had been contended on behalf of the Prussian government that there was no violation of law inasmuch as the proximate intent of the vessel was not to commit hostilities against Denmark but to proceed to Bremerhaven and there await orders.

The Attorney General said that: "any intent, direct or contingent, \* \* \* is within the act."

5 Op. Atty. Gen., 92.

**Prohibition extends to vessels intended for insurgents.**

In 1869, the Attorney General of the United States held that the neutrality act of 1818 would extend to the fitting out and arming of vessels for a revolted colony, whose belligerency had not been recognized.

13 Op. Atty. Gen., 177.

Article 8, Hague Convention XIII, 1907, is substantially identical with section 128, Austro-Hungarian Manual, 1913.

Genet [the French Minister] claimed the right of remaining in our ports, under the 17th and 26th articles of the Treaty of Commerce. But the government held that the privilege did not extend to vessels fitted out in our ports to cruise against friendly commerce.

The British Minister claimed that the prizes captured by such cruisers, and coming within American jurisdiction, should be restored. This claim was embarrassing to Washington, under the treaty with France. The result was, a despatch of 5th June, 1793, to the British and French ministers, which became an epoch in American neutrality. It declared that the fitting-out and commissioning of cruisers would be prohibited hereafter, and demanded the departure of such vessels from our ports; but, as to the surrender of prizes already taken by French privateers so fitted out, the government declined to enforce it, on the ground that these acts were done in remote ports, at the beginning of the war, before the proclamation, when parties did not know their rights under the treaty, and the laws of nations were not ascertained, and the difficulty of communication was great; and that, if the United States did its duty in suppressing such acts in the future, it ought to be accepted as a reasonable measure of justice between the belligerent powers, under the peculiar situation of the country. It was suggested also, that, if the captures were invalid, the Courts of Admiralty in the United States would deliver up the prizes, on private application and suit.

Note 215, Dana's Wheaton.

[In 1793], the Minister of France asserted the right of arming and equipping vessels for war, \* \* \* within the neutral territory of the United States. Examining this question under the law of nations and the general usage of mankind, the American government produced proofs, from the most enlightened and approved writers on the subject, that a neutral nation must, in respect to the war, observe an exact impartiality towards the belligerent parties; that

favors to the one, to the prejudice of the other, would import a fraudulent neutrality, of which no nation would be the dupe; that no succor ought to be given to either, unless stipulated by treaty, in men, arms, or any thing else, directly serving for war; \* \* \* that, finally, the treaty of 1778, making it unlawful for the enemies of France to arm in the United States, could not be construed affirmatively into a permission to the French to arm in those ports, the treaty being express as to the prohibition, but silent as to the permission.

Dana's Wheaton, p. 519; Mr. Jefferson's letter to Mr. G. Morris, August 16, 1793; Waite's State Pap. 1, 140.

During the correspondence between the two governments [England and France] with reference to the covert help afforded to the American insurgents in France [in 1777], M. de Vergennes admitted that France was bound to prevent ships of war from being armed and manned with French subjects within its territory to cruise against England.

Hall, p. 612.

Somewhat later [Aug. 16, 1793], he [Mr. Jefferson] writes to Mr. Morris, American Minister in Paris, 'that a neutral nation must in all things relating to the war observe an exact impartiality towards the two parties \* \* \* that no succor should be given to either, unless stipulated by treaty \* \* \* that if the United States have a right to refuse the permission to arm vessels \* \* \* within their ports \* \* \* they are bound by the laws of neutrality to exercise that right and to prohibit such armaments \* \* \*'.

Hall, p. 615, American State Papers. 1, 116.

It was stated by the U. S. Secretary of State on Feb. 21, 1878, that a vessel constructed in the United States for a hostile attack on a friendly sovereign will be arrested, under the neutrality laws, even though she is not yet complete, and the intention is to send her to a foreign port for completion.

Mr. Evarts, Secretary of State, to Mr. Sullivan, February 21, 1878, Moore's Digest, vol. vii, pp. 896, 897.

**Prohibition does not extend to vessels ordered by recognized government with which to war upon insurgents.**

The president of a shipbuilding firm in Wilmington, Delaware, inquired whether he could, without infringing the neutrality laws of the United States, fit out and deliver to officers of the Colombian Government at Wilmington, with a custom-house clearance for a Colombian port, an armed gunboat with which the Colombian Government expected to take Cartagena and other Colombian ports then in the hands of the insurgents. The Department of State replied: "The existence of a state of war has not, in a formal sense, been recognized by this Government in respect of the hostilities in Colombia, nor have the insurgents there in arms against the recognized Government been regarded as belligerents. There does not appear to be any possible ground, therefore, for considering a contractual operation such as you describe, with the legitimate authorities of Colombia, as a contravention of the neutrality statutes of the United States. The same question came up during the late Haytian insur-

rection, when the insurgents, who held Jacmel, Gonaives, and other ports of Hayti, sent agents to the United States to oppose and to contest by legal means the right of the legitimate Government of Hayti to procure warlike supplies in the United States, and the result was wholly adverse to their pretensions. I see no reason to regard your proposed delivery of such gunboat to the Colombian minister or his authorized agent as other than an ordinary commercial venture on your part."

Moore's Digest, vol. vii, p. 1079; Mr. Bayard, Secretary of State, to Mr. Gibbons, July 3, 1885; see also, 13 Op. Atty. Gen., 177.

About the middle of March, 1898, upwards of a month before the commencement of hostilities between the United States and Spain, the United States purchased two war ships then building in England—a torpedo boat and the Brazilian cruiser *Almirante Abreu*. When war was announced, the British Government promptly prohibited the departure of the nearly completed torpedo boat, which had been named the *Somers*, and stopped work on the cruiser. This action appeared to be in conformity with the obligations of neutrality, and was acquiesced in by the United States.

Moore's Digest, vol. vii, p. 861.

*U. S. v. Guinet, 2 Dallas, 321.*—On the trial of John Etienne Guinet, indicted "for being knowingly concerned in furnishing, fitting out, and arming *Les Jumeaux*, in the port and river Delaware, with intent that she should be employed in the service of the French Republic to cruise or commit hostilities upon the subjects of Great Britain, with whom the United States are at peace, it appeared that the vessel in question arrived at the port of Philadelphia with a cargo of coffee and sugar from the West Indies; that she left her wharf at Philadelphia with only four guns, the number she brought into port, but that when she had dropped to some distance below, she took on board three or four guns more, a number of muskets, water-casks, etc., and it is manifest, that other guns were ready to be sent her by the pilot boat."

The court said that these circumstances clearly proved a conversion from the original commercial design of the vessel, and that since the goods thus put on board were not mentioned in the manifest, it could not reasonably be contended that they were articles of merchandise.

The accused was found guilty.

*U. S. v. Quincy, 6 Peters, 445.*—The defendant was indicted for the offence of being knowingly concerned in the fitting out of a vessel, with the intent that she should be employed in the service of a foreign people, to commit hostilities against the subjects of a foreign prince, with whom the United States was at peace.

The court said: "The offence consists principally in the intention with which the preparations were made. These preparations, according to the very terms of the act must be made within the limits of the United States; and it is equally necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States. And this must be a fixed intention; not conditional or contingent, depending on some future arrangements."

*The "Alerta," 9 Cranch, 359.*—The Spanish vessel *Alerta* was captured on the high seas in 1810 by the French privateer *L'Epine*, and was later brought to New Orleans. It appeared that *L'Epine* had been armed and equipped for war, and had been manned by American citizens, all in a port of the United States.

Held that whenever a capture has been made by a privateer which has been illegally equipped in a neutral country, it is the duty of the prize courts of such country, as a vindication of her neutrality, to restore property, captured by that privateer.

See also *Talbot v. Janson*, 3 Dallas, 133; *U. S. v. Le Vengeance*, id., 297; *Novion v. Hallett*, 16 Johnson, 327.

**Authority of the President, under section 5287, Revised Statutes.**

*Gelston v. Hoyt, 3 Wheaton, 246.*—In this case the court expressed the opinion that the authority given to the President to use the naval and military authorities of the United States to seize an offending vessel, does not authorize him to employ *civil* force for this purpose.

The court said: "The power thus entrusted to the President is of a very high and delicate nature, and manifestly intended to be exercised only when, by the ordinary process or exercise of civil authority, the purposes of the law cannot be effectuated. It is to be exerted on extraordinary occasions, and subject to that high responsibility which all executive acts necessarily involve. \* \* \* Surely it never could have been the intention of Congress that such a power should be allowed as a shield to the seizing officer, in cases where that seizure might be made by the ordinary civil means. One of the cases put in the section is, where any process of the courts of the United States is disobeyed and resisted; and this case abundantly shows that the authority of the President was not intended to be called into exercise, unless where military and naval force were necessary to insure the execution of the laws."

See also 14 Op. Atty. Gen., 336, wherein Attorney General Nelson said that "the authority of the President to employ the naval forces of the United States, conferred by the 8th section of the act, will be dependent upon the resistance to the execution of the process of the courts of the United States on board of the steamers, and to the refusal of their commanders, if their force has been augmented or increased, to discharge therefrom such augmentation or increase."

**Duty of neutral to seize vessel which has illegally departed and again come within its jurisdiction.**

*The "Gran Para," 7 Wheaton, 471, 487.*—This was a case of a vessel fitted out in violation of the neutrality laws of the United States which departed for Buenos Aires, was there commissioned as a privateer and afterwards captured a prize which she brought to the United States. It was argued on behalf of the vessel that as she made no capture on her way to Buenos Aires, her offense against the neutrality laws ended there. Respecting this argument, the Court said: "If this were to be admitted in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as this enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted in our ports for military operations, need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew, to become perfectly legitimate cruisers, purified from every taint contracted at the place



where all their real force and capacity for annoyance was acquired. This would, indeed, be a fraudulent neutrality, disgraceful to our own Government, and of which no nation would be the dupe."

#### Geneva Arbitration.

It was maintained in the American case [in the Geneva arbitration] that, by the true construction of the second clause of the first rule of the treaty, when a vessel like the *Florida*, *Alabama*, *Georgia*, or *Shenandoah*, which has been especially adapted within a neutral port for the use of a belligerent in war, comes again within the neutral's jurisdiction, it is the duty of the neutral to seize and detain it. This construction was denied by Great Britain. It was maintained in the British papers submitted to the tribunal, that the obligation created by this clause refers only to the duty of preventing the original departure of the vessel, and that the fact that the vessel was, after the original departure from the neutral port, commissioned as a ship of war protects it against detention.

\* \* \* \* \*

In the award the tribunal says that—"The effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the Government of the belligerent power, benefited by the violations of neutrality, may afterwards have granted to that vessel; and the ultimate step by which the offense is completed can not be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence. The privilege of extritoriality, accorded to vessels of war, has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principles of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality."

Moore's Digest, vol. vii, pp. 1043, 1044, quoting from the report of Mr. J. C. B. Davis, agent of the United States at Geneva, September 21, 1872, Papers relating to the treaty of Washington, IV, 10-11.

*The "Nereyda,"* 8 Wheaton, 108.—In this case, a Spanish ship of war was captured by the privateer *Irresistible*, which was fitted out, owned, and commanded by American citizens, cruising under a commission from Artigas, as chief of the Oriental Republic of Rio de la Plata. The prize was taken to Margarita, an island of Venezuela, and there condemned as prize, Venezuela being an ally of the Oriental Republic. She was there commissioned as a Venezuelan privateer, and came to Baltimore. Here she was libelled on behalf of the King of Spain on the ground that the *Irresistible* had been illegally fitted out in an American port. A claim was set up by one Francesche, who alleged that he had bought her at the prize sale. The Supreme Court held that the purchase was not proved, and that she was still in the hands and ownership of the owners of the *Irresistible*; that their title was not improved by the condemnation, if valid otherwise, and restored her to the King of Spain.

Dana's Wheaton, p. 555, note.

*The "Meteor,"* 17 Fed. Case, No. 9498.—This was the case of a vessel built in the United States in 1865 during the war between

Spain and Chile, which it was attempted to sell to Chile, *without armament*. She was commissioned as a Chilean privateer while within the limits of the United States.

It was maintained by the claimant that under the facts stated there was no violation of the neutrality statutes, since it was not intended to arm the vessel within the United States, even if it were the intent to arm her immediately after leaving the United States, for the purpose of cruising against Spain.

The District Court condemned the vessel, but the Circuit Court reversed the judgment, not however on grounds of law but of fact.

*United States v. Rand*, 17 Fed. Rep., 142.—The defendants, captain and mate of a vessel, were indicted for violation of the provisions of Section 5286, Revised Statutes, against beginning or preparing the means in the United States for any military expedition against any foreign state or people, with whom the United States is at peace.

The defendants claimed that when they sailed with the vessel, they were ignorant of the character of the enterprise and that their connection with what happened thereafter was the result of coercion.

The court charged that if this claim were true, it constituted a perfect defense but that the jury should consider certain suspicious circumstances in this connection.

*The "Mary Hogan,"* 18 Fed. Rep., 529.—This was the case of a vessel seized for being fitted out in the United States to commit hostilities against the government of Haiti. No arms or ammunition were found on the vessel, but it appeared that the person who actually bought the vessel, and who was agent of the Haitian revolutionists, about the same time bought arms and ammunition; and it appeared that certain arms were loaded on another vessel which sailed just before the seizure of the *Mary Hogan* and it had been arranged that a vessel was to meet, in Delaware Bay, the vessel which sailed. The meeting did not take place, presumably because of the seizure of the *Mary Hogan*. Moreover several witnesses testified that the man in whose name the *Mary Hogan* was registered stated that he was going to fight against Haiti and it appeared that the vessel was unsuited for the purpose to which the claimants alleged she was to be put. The court concluded that the evidence established a hostile expedition organized and dispatched from the United States in separate parts to be united at a rendezvous on the high seas, and thence to proceed to Haiti in completion of the original hostile purpose with which the different parts were so dispatched.

See also *The City of Mexico*, 28 Fed. Rep., 148.

*United States v. 214 Bowes Arms, etc.*, 20 Fed. Rep., 50.—In this case it was held that, under the provisions of section 5283, Revised Statutes, arms and ammunition on board a vessel intended for the equipment of another vessel fitted out in violation of the neutrality laws, are subject to seizure, even though the delivery has never been completed.

*The "Itata,"* 56 Fed. Rep., 505.—But the vessel transporting such arms and ammunition is not liable to forfeiture.

*The "City of Mexico,"* 28 Fed. Rep., 148.—In this case the Court said: "This vessel was furnished and fitted out, in the usual acceptance of the terms, provided with the necessary supplies, and put in a condition for proceeding to sea, within the United States. Whether

she was well furnished or thoroughly fitted out is not the question, if she was so supplied as to proceed on her way."

In this case the court held that a vessel must be considered as committing hostilities within the meaning of section 5283, Revised Statutes, when it forms a part of a hostile expedition either by carrying troops for the purpose of making, if necessary, a forcible landing for them or by acting as a base of supplies for the expedition.

The court said: "It matters but little, in the effect of her hostilities, whether she throw shot and shell from her ports or despatch boat-loads of men from her gangways."

*The "Carondelet," 37 Fed. Rep., 799.*—In this case the court expressed the opinion that "when the arming is on the high seas, through another vessel, proof that both were despatched from our ports as parts of a concerted scheme made here, is justly held proof of 'an attempt, within the limits of our jurisdiction, to fit out and arm' the vessel with intent to commit hostilities, and hence within the statute."

In this case the court said that "there can be no obligation of neutrality except towards some recognized state or power, *de jure* or *de facto*. Neutrality presupposes at least two belligerents; and, as respects any recognition of belligerency, i. e., of belligerent rights, the judiciary must follow the executive. To fall within the statute, the vessel must be intended to be employed in the service of a foreign prince, state, colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of another, with which the United States are 'at peace.' The United States can hardly be said to be 'at peace,' in the sense of the statute, with a faction which they are unwilling to recognize as a government; nor could the cruising, or committing of hostilities, against such a mere faction well be said to be committing hostilities against the 'subjects, citizens, or property of a district or people,' within the meaning of the statute."

*The "Conserva," 38 Fed. Rep., 431.*—In this case it was held that in order to justify the forfeiture of a vessel under Section 5283, Revised Statutes, it must be shown that the government against which it is alleged the vessel is intended to commit hostilities has been recognized by the United States.

See also 13. Op. Atty. Gen. 177, in which it was said that when a nation undertakes to procure vessels to enforce its recognized authority in its own domains, "in a legal view this does not involve a design to commit hostilities against anybody."

The *transportation* of arms for hostile purposes does not bring a vessel within the purview of section 5283, Revised Statutes.

U. S. *v.* The Robert and Minnie, 47 Fed. Rep., 84; U. S. *v.* Trumbull, 48 id., 99; U. S. *v.* Itata, 49 id., 646.

*Hendricks v. Gonzalez, 67 Fed. Rep., 351.*—The court said: "On the other hand, it is the duty of every government to prevent the fitting out, arming, or equipping of vessels which it has reasonable ground to believe are intended to engage in naval warfare with a power with which it is at peace. These are familiar rules of international obligation, in the light of which the particular statute is to be read. It is intended to prevent the departure from our ports of any vessel intended to carry on war, when the vessel has been spe-

cially adapted, wholly or in part, within this jurisdiction, to warlike use."

In this case the court held that collectors of customs are not justified under the provisions of Section 5290, Revised Statutes in refusing clearance to a vessel, simply because it is the purpose of her intended voyage to transport arms and munitions of war for the use of an insurrectionary party in a country with which the United States are at peace.

*The "Laurada,"* 85 Fed. Rep., 760.—In this case the court said that "the term 'hostilities' is certainly not 'expressly limited' in its scope by the section [5283, Revised Statutes] to strictly maritime warfare, and may include all hostilities for which a vessel is adapted.

The court held that to bring a vessel within the purview of section 5283, Revised Statutes, the intention to employ her in the prohibited service must be formed *within the territorial limits* of the United States.

#### Aid to insurgents.

*The "Three Friends,"* 166 U. S., 1.—This was the case of a vessel seized and libeled on behalf of the United States for having been fitted out and armed in the service of "a certain people" then engaged in armed resistance to the King of Spain in the island of Cuba.

The court held that, within the meaning of Section 5283, Revised Statutes, "the word 'people' \* \* \* taken in connection with the words 'colony' and 'district' covers \* \* \* any insurgent or insurrectionary 'body of people acting together, undertaking or committing hostilities,' although its belligerency has not been recognised."

#### Vessel intended for the use of insurgents.

*The "Salvador,"* 3 Privy Council Rep., 218.—In this case the court found these propositions established beyond all doubt—"There was an insurrection in the Island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents beyond all doubt formed part of the province or people of Cuba, and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents."

Therefore, the court sustained the seizure of the vessel, under the law of Great Britain.

*The "Gäumtlet,"* L. R. 3 Adm., 381.—This was a case in which a French vessel which had captured a merchant prize in the Franco-German war, brought the prize to an English port, put a prize crew on board and departed. After the prize had remained over twenty-four hours in British waters, she was ordered to depart, and a British steam-tug was employed, which towed the prize to a French port.

Held that the tug did not have reasonable cause to believe that the prize would be used in the French service so as to make her liable to condemnation under the law declaring forfeited to the Crown any ship which is used in despatching any vessel with reasonable cause to believe that the vessel will be used in the service of any foreign state at war with a friendly state.

**OBLIGATION OF NEUTRAL TO BE IMPARTIAL REGARDING ADMISSION OF BELLIGERENT VESSELS OR PRIZES TO ITS PORTS—EXCEPTION IN CASE OF OFFENDING VESSEL.**

**A neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships or of their prizes.**

**Nevertheless, a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.—*Hague Convention XIII, 1907, Article 9.***

Though a belligerent vessel may not enter within neutral jurisdiction for hostile purposes, she may, consistently with a state of neutrality, until prohibited by the neutral power, bring her prize into a neutral port, and sell it. The neutral power is, however, at liberty to refuse this privilege, provided the refusal be made, as the privilege ought to be granted, to both parties, or to neither.

Kent, vol. 1, p. 132.

A violation of neutrality is not limited to acts of positive hostility. If the neutral state assist one of the belligerents; if it grant favors to one to the detriment of the other; \* \* \* it violates its duties toward the belligerent who is injured by such act or neglect, and is justly chargeable with hostility. Such conduct furnishes good cause for complaint, and, if persisted in, may become just cause of war.

Halleck, p. 629.

A neutral state, by virtue of its general right of police over its ports, harbors and coasts, may impose such restrictions upon belligerent vessels, which come within its jurisdiction, as may be deemed necessary for its own neutrality and peace, and so long as such restrictions are impartially imposed upon all the belligerent powers, neither can have any right to complain. This right is frequently exercised in prohibiting all armed cruisers with prizes to enter such neutral ports and waters, and, even without prizes, to obtain provisions and supplies. Thus usage is shown by marine ordinances and text writers of different nations.

Halleck, p. 522.

To furnish succors, or auxillaries, or to extend privileges to one belligerent, to the detriment of the other, is undoubtedly a violation of strict neutrality, and, as such, is a just cause of complaint, if not of war.

Halleck, p. 515.

The rights of neutrality are connected with correspondent duties. Among these duties is that of impartiality between the contending parties. The neutral is the common friend of both parties, and consequently is not at liberty to favor one party to the detriment of the other.

Dana's Wheaton, p. 509.

The progress of modern times has been towards insisting on entire and impartial neutrality. It is difficult to conceive now of a State being permitted to continue a condition of limited and partial neutrality. A belligerent would be justified in treating any State as an enemy throughout, which rendered any aid to its enemy, whether in pursuance of treaty obligations or not, or which gave or withheld belligerent privileges unequally.

Note 203, Dana's Wheaton.

#### Exception.

Another case of qualified neutrality arises out of treaty stipulations antecedent to the commencement of hostilities, by which the neutral may be bound to admit the vessels of war of one of the belligerent parties, with their prizes, into his ports, whilst those of the other may be entirely excluded, or only admitted under limitations and restrictions. Thus, by the treaty of amity and commerce of 1778, between the United States and France, the latter secured to herself two special privileges in the American ports:—1. Admission for her privateers, with their prizes, to the exclusion of her enemies. 2. Admission for her public ships of war, in case of urgent necessity, to refresh, victual, repair, &c., but not exclusively of other nations at war with her. \* \* \* Great Britain and Holland \* \* \* complained of the exclusive privileges allowed to France in respect to her privateers and prizes, \* \* \* it was answered by the American government, that they enjoyed a perfect equality, qualified only by the exclusive admission of the privateers and prizes of France, which was the effect of a treaty made long before, for valuable considerations, not with a view to circumstances such as had occurred in the war of the French Revolution, nor against any nation in particular, but against all nations in general, and which might, therefore, be observed without giving just offense to any.

Dana's Wheaton, pp. 518-519.

It follows that powers not parties to the war must treat both belligerents alike as friends. Hence no privilege can be granted or withheld from one and not equally from the other. Thus, if transit, or the entrance into harbors of ships of war, for the purpose of refitting or of procuring military supplies, or the admission of captured prizes and their cargoes, is allowed to the one belligerent, the other may claim it also. Otherwise a state aids one of its friends in acts of violence against another, which is unjust, or aids a friend in fighting against another party, which is to be an ally and not a neutral.

Woolsey, p. 271.

The wrong doing vessel [which has captured a vessel within the neutral's waters, or in violation of his laws for maintaining neu-

trality] may afterwards have entrance into the waters of the injured neutral refused to it, since all admission of war-vessels into neutral waters, unless required by treaty, depends on comity alone.

Woolsey, p. 283.

But though, if a vessel so commissioned is admitted at all within the ports of the neutral, it must be accorded the full privileges attached to its public character, there is no international usage which dictates that ships of war shall be allowed to enter foreign ports, except in cases of imminent danger or urgent need. It is fully recognized that a state may either refuse such admission altogether, or may limit the enjoyment of the privilege by whatever regulations it may choose to lay down. It is therefore eminently to be wished that a practice may be established under which a neutral government shall notify at the commencement of a war, that all vessels mixed up in certain specified ways, whether as agents or objects, with an infringement of its neutrality, will be excluded from its ports. The rules established by the Empire of Brazil during the American Civil War adopted this precaution, though in dangerously vague language, by directing that no belligerent who had once violated the neutrality of the Empire should be admitted to its ports during the continuance of hostilities, and that all vessels attempting acts tending to such violation should be compelled to leave its maritime territory immediately, without receiving any supplies.

Hall, pp. 647, 648; Negrin, p. 179.

It remains to be considered whether any asylum at all ought to be given in neutral waters to belligerent ships of war or their prizes when the former have been fitted out or the latter taken in breach of the neutrality of the very state under the protection of which they seek to shelter. We have seen that by British law and the United States' practice the prize which is in such a case is so far from enjoying an asylum that she ought to be seized and restored. It has been thought that from a ship of war the stain of violated neutrality is wiped away by her commission. Accordingly the Confederate cruisers which had been illegally despatched from English ports were afterwards treated by the British authorities as if there was nothing against them. That view was not accepted by the arbitrators at Geneva, who found that "the *Alabama* was on several occasions freely admitted into the ports of the colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found"; a finding of similar purport being made as to the *Florida*, with the addition, "nor can the fact of the entry of the *Florida* into the Confederate port of Mobile, and of its stay there during four months, extinguish the responsibility previously to that time incurred by Great Britain." This appears to be the correct reasoning. A state which has not adequately enforced the observance of its neutrality is bound to take every opportunity of stopping the mischievous consequences of its slip, nor can its doing so be rightfully complained of by a foreign sovereign who has granted a commission only rendered possible by the violation of neutrality. At least the obligation resulting from the slip cannot be destroyed by the circumstance that it may involve the state to which the slip is imputable

in a difficulty with a third party. To intern the offending ship without insisting on her forfeiture would seem to conciliate as far as possible the duty of stopping her career with respect to a foreign flag.

Westlake, vol. 2, pp. 244, 245.

Unless a neutral expressly forbids the entry of belligerent warships, they may freely enjoy the hospitality of its ports and waters. Permission is assumed in the absence of any notice to the contrary, but nevertheless it is a privilege based upon the consent of the neutral, and therefore capable of being accompanied by conditions or withdrawn altogether as a punishment for illegal conduct. Moreover, a rule of absolute exclusion may be adopted as long as it is applied to each of the combatants, the latest instance being that afforded by the Scandinavian powers in the Russo-Japanese War. Belligerent commanders can demand that they shall not be asked to submit to unjust and unreasonable restraints, and that whatever rules are made shall be enforced impartially on both sides. But further they cannot go.

Lawrence, p. 623-624.

Although a neutral may grant asylum to belligerent men-of-war in his ports, he has no duty to do so. He may prohibit all belligerent men-of-war from entering any of his ports, whether these vessels are pursued by the enemy or desire to enter for other reasons. However, his duty of impartiality must prevent him from denying to the one party what he grants to the other, and he may not, therefore, allow entry to men-of-war of one belligerent without giving the same permission to men-of-war of the other belligerent. Neutrals as a rule admit men-of-war of both parties, but they frequently exclude all men-of-war of both parties from entering certain ports.

Oppenheim, vol. 2, pp. 417-418.

This contest [between Spain and her colonies] was considered at an early stage by my predecessor a civil war in which the parties were entitled to equal rights in our ports. This decision, the first made by any power, being formed on great consideration of the comparative strength and resources of the parties, the length of time, and successful opposition made by the colonies, and of all other circumstances on which it ought to depend, was in strict accord with the law of nations. Congress has invariably acted on this principle, having made no change in our relations with either party. Our attitude has therefore been that of neutrality between them, which has been maintained by the government with the strictest impartiality. No aid has been afforded to either, nor has any privilege been enjoyed by the one which has not been equally open to the other party, and every exertion has been made in its power to enforce the execution of the laws prohibiting illegal equipments with equal rigor against both.

By this equality between the parties their public vessels have been received in our ports on the same footing; they have enjoyed an equal right to purchase and export arms, munitions of war, and every other supply, the exportation of all articles whatever being permitted under the laws which were passed long before the commencement of the contest; our citizens have treated equally with



both, and their commerce with each has been alike protected by the Government.

President Monroe, Second inaugural address, March 5, 1821, Richardson's Messages of the Presidents, II, 88.

\* \* \* whatever privileges shall be accorded to one belligerent within the ports of the United States shall be in like manner accorded to the other.

President Grant's neutrality proclamation, August 22, 1870, For. Rel. 1870, 45.

Article 9, Hague Convention XIII, 1907, is substantially identical with section 129, Austro-Hungarian Manual, 1913.

*The "Santissima Trinidad," 7 Wheaton, 283.*—In this case the court held that as the Government of the United States had recognized the existence of a civil war between Spain and Buenos Ayres and avowed a determination to remain neutral between the parties and to allow to each the same rights of asylum and hospitality and intercourse, each party was to be deemed a belligerent nation, having sovereign rights of war, and that all the immunities which might be claimed by public ships in the ports of the United States, under the law of nations, must be considered by the courts as equally the right of each.

**The neutrality of a Power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents.**—*Hague Convention XIII, 1907, Article 10.*

All ships without distinction have the right of innocent passage through the territorial sea, \* \* \* saving to neutrals the right of regulating the passage of ships of war of all nationalities through the said sea.

Institute, 1894, p. 114.

If a belligerent cruiser inoffensively passes over a portion of water lying within neutral jurisdiction, that fact is not usually considered such a violation of the territory as to affect and invalidate an ulterior capture made beyond it. The passage of ships over territorial portions of the sea is a thing less guarded than the passage of armies on land, because less inconvenient, and permission to pass over them is not usually required or asked.

Kent, vol. 1, p. 126.

This exemption [of neutral territory from hostilities] extends to the passage of \* \* \* [a] fleet through the limits of the territorial jurisdiction, which can hardly be considered an innocent passage, such as one nation has a right to demand from another; and, even if it were such an innocent passage, is one of those *imperfect* rights, the exercise of which depends upon the consent of the proprietor, and which cannot be compelled against his will. It may be granted or withheld, at the discretion of the neutral State; but its being granted is no ground of complaint on the part of the other belligerent power, provided the same privilege is granted to him, unless there be sufficient reasons for withholding it.

Dana's Wheaton, p. 520.

If a belligerent cruiser, in acting offensively, passes over a portion of water within neutral jurisdiction, that fact is not usually considered such a violation of the territory as to invalidate an ulterior capture made beyond it. Permission to pass over territorial portions of the sea is not usually required or asked, because not supposed to result in any inconvenience to the neutral power. For example, in a war between England and Russia, belligerent vessels must pass the *sound* over which Denmark claims and exercises imperial rights. So in a war between France and Russia, armed vessels might be obliged to pass through the neutral waters of the *Dardanelles*; but in neither of these cases would the passage be deemed a violation of neutral rights, nor would a capture by either power be invalidated

by the fact of such passage, *animo capiendi*, to the place where his right of capture could be exercised.

Halleck, p. 527.

**Contra.**

It was formerly thought that the neutral might allow \* \* \* the passage of ships engaged in the service of war through his waters \* \* \* if he granted the same to both sides. All now admit that the neutral ought to refuse any of these privileges, and must be the sole judge in the case.

Woolsey, pp. 278, 279.

We have already seen that the right of innocent passage through the littoral waters of a neutral state extends to belligerent ships of war, subject to the neutral's right to regulate it, and so long as it is used truly for passage and not for anchoring or hovering. To that extent the neutral power makes no concession to the belligerent by not interfering with his right of passage, but the regulations which the neutral has to make in order to prevent the abuse of that right are substantially the same as those required for ports and roadsteads, although their enforcement may not be always practicable.

Westlake, vol. 2, pp. 234, 235.

The question is on a very different footing as far as marginal waters are concerned. In discussing rights over them we came to the conclusion that territorial powers were bound to allow passage to all vessels of states with which they were at peace, when such waters were channels of communication between two portions of the high seas. This right of innocent passage belongs to war-ships as well as to private vessels. But it is maintained in some quarters that the right of a neutral government to exclude the fighting vessels of belligerents from its ports and waters involves a right to deny them even innocent passage. The only point absolutely clear is that a neutral power may not close a narrow strait uniting two open seas, even though it possesses territorial sovereignty over the entire passage.

Lawrence, pp. 635-636.

In contradistinction to passage of troops through his territory, the duty of impartiality incumbent upon a neutral does not require him to forbid the passage of belligerent men-of-war through the maritime belt forming part of his territorial waters. \* \* \* Since, as stated above in Vol. I, Sec. 188, every littoral State may even in time of peace prohibit the passage of foreign men-of-war through its maritime belt provided such belt does not form a part of the highways for international traffic, it may certainly prohibit the passage of belligerent men-of-war in time of war. However, no duty exists for a neutral to prohibit such passage in time of war. \* \* \* The reason is that such passage and \* \* \* contain very little assistance indeed, and are justified by the character of the sea as an international high road.

Oppenheim, vol. 2, pp. 393-394.

But he [the Commander] may pass over Neutral Territorial Waters in order to effect a Capture beyond, provided they are not

Waters which cannot usually be passed through without express permission.

Holland, p. 2.

Article 10, Hague Convention XIII, 1907, is apparently identical with section 130, Austro-Hungarian Manual, 1913.

Early in April, 1898, the Canadian Government, acting upon a request presented by the Department of State to the British ambassador at Washington, granted permission for four United States revenue cutters to pass through the canals under Canadian control from the Great Lakes to the Atlantic coast, two of the vessels being armed revenue cutters, while the other two were under construction and were not to be delivered by the builders to the United States till they reached the sea. April 27, 1898, war between the United States and Spain having meanwhile begun, a memorandum was left at the Department of State by the British Ambassador, in which, referring to the fact that the four vessels were in Lake Ontario awaiting the opening of navigation, he stated that Her Majesty's Government were of opinion that the permission given before the outbreak of war should not be withdrawn, "provided that the United States Government are willing to give an assurance that the vessels in question will proceed straight to a United States port without engaging in any hostile operation." The opinion was further expressed "that the vessels should not be furnished with more coal and stores than are necessary to take them to New York or some other United States port within easy reach." The hope was expressed that assurances to that effect would at once be given, "in order that the facilities granted before the outbreak of war \* \* \* may still be extended without any breach of neutrality." The Department of State replied that instructions would be sent to the commanders of the vessels to observe the conditions above expressed, but added: "It is, of course, understood that the prohibition of engaging in any hostile operation would not preclude resistance to a hostile attack." On the 4th of May the British Ambassador was advised that the proper orders had been issued to the commanding officers of two vessels which were then on their way to the Atlantic coast, and that similar orders would be given to the others whenever they should follow.

Moore's Digest, vol. 1, p. 938, For. Rel. 1898, 968-970.

*The "Twee Gebroeders," 3 C. Rob., 354.*—The Court said: "Where a free passage is generally enjoyed, notwithstanding a claim of territory may exist for certain purposes, no violation of territory is committed, if the party, after an inoffensive passage, conducted in the usual manner, begins an act of hostility in open ground. In order to have an invalidating effect, it must at least be either an *unpermitted* passage, over territory where permission is regularly requested; or a passage under a permission obtained on false representation, and suggestions of the purpose designed. In either of these cases there might be an original misfeasance, and trespass, that travelled throughout and contaminated the whole; but if nothing of this sort can be objected, I am of opinion, that a capture, otherwise legal, is in no degree affected by a passage over territory, in itself otherwise legal and permitted."

EMPLOYMENT BY BELLIGERENT VESSELS OF NEUTRAL PILOTS.

**A neutral Power may allow belligerent war-ships to employ its licensed pilots.**—*Hague Convention XIII, 1907, Article 11.*

Professor Oppenheim justly points out that this must be understood as limited to pilotage in territorial waters. \* \* \*

Westlake, vol. 2, p. 247.

There would certainly be no objection to a neutral allowing belligerent vessels to which asylum is legitimately granted, to be piloted into his ports, and likewise such vessels to be piloted through his maritime belt if their passage is not prohibited. But a belligerent might justly object to the men-of-war of his adversary being piloted on the Open Sea by pilots of a neutral Power, except in a case of distress.

It is worth mentioning that Great Britain during the Franco-German War in 1870, prohibited her pilots from conducting German and French men-of-war which were outside the maritime belt, except when in distress.

Oppenheim, vol. 2, pp. 432-433.

Article 11, Hague Convention XIII, 1907, is substantially identical with section 131, Austro-Hungarian Manual, 1913.

In March, 1885, Mr. Young, American minister at Peking, referring to the war then going on between France and China, cabled to his Government as follows: "Chinese object American pilots French men-of-war. Shall I forbid such service?" To this inquiry Mr. Bayard replied: "Although well disposed, we can not forbid our citizens serving under private contract at their own risk. Not prohibited by statutes or cognizable by consuls."

Moore's Digest, vol. vii, p. 1051, For. Rel. 1885, 160.

LENGTH OF STAY OF BELLIGERENT VESSELS IN NEUTRAL PORTS, ROADSTADS, OR WATERS.

In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war-ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention.

If a Power which has been informed of the outbreak of hostilities learns that a belligerent war-ship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations.—*Hague Convention XIII, 1907, Articles 12 and 13.*

Granting of asylum to belligerents in neutral ports, although depending upon the pleasure of the sovereign State and not required of it, shall be presumed, unless previous notification to the contrary has been given.

With regard to war-ships, however, it shall be limited to cases of real distress, in consequence of: 1. defeat, sickness or insufficient crew; 2. perils of the sea; 3. lack of the means of subsistence or locomotion (water, coal, provisions); 4. need of repairs.

*Institute, 1898, p. 154.*

It is now the custom to fix a short time for the stay of such vessels [belligerent cruisers in neutral ports], after they have done what is permitted them, or the marine exigency has passed,—usually twenty-four hours.

*Note 208, Dana's Wheaton.*

In the case of ships of war running into neutral waters in order to escape from an enemy, to demand that they shall either be disarmed, like fugitive troops, or return to the high seas, seems to be a harsh measure, and unauthorized by the usages of nations. An instance of such harshness occurred in the war between Schleswig-Holstein and Denmark. A small war steamer, belonging to the former party, ran for safety, in July, 1850, into the waters of Lübeck, which was on friendly terms with both belligerents. The senate of Lübeck had given orders that vessels of war of either party, appearing within its jurisdiction, must lay down their arms or depart beyond cannon-shot from the coast. The lieutenant commanding the steamer chose the latter alternative. In justification of its conduct, which was impartial, Lübeck only pleaded that the neutral, in regard to the

rules of hospitality, must consult its own interests, and that small states, in order to have their character for neutrality respected, must "observe in everything which relates to war itself the stricter rules of neutrality". They would receive, they said, vessels of the belligerent parties only when escaping the perils of the seas, and then only whilst such perils lasted. The analogy from the practice of disarming fugitive troops does not hold here. If the ship is driven out at once, it goes where superior force is waiting for it; if it remains disarmed the expense and inconvenience are great.

Woolsey, pp. 272, 273.

It will probably be found necessary to supplement the twenty-four hours' rule [for the detention in a neutral port of a belligerent war vessel after the sailing of a hostile vessel] by imposing some limit to the time during which belligerent vessels may remain in a neutral port when not actually receiving repairs. The insufficiency of the twenty-four hours' rule, taken by itself, is illustrated by an incident which occurred during the American Civil War. In the end of 1861, the United States corvette *Tuscarora* arrived in Southampton Water with the object, as it ultimately appeared, of preventing the exit of the Confederate cruiser *Nashville*, which was then in dock. By keeping up steam and having slips on her cable, so that the moment the *Nashville* moved, the *Tuscarora* could precede her, and claim priority of sailing, by moving and returning again within twenty-four hours, and by notifying and then postponing her own departure, the latter vessel attempted and for some time was able to blockade the *Nashville* within British waters. In order to guard against the repetition of such acts, it was ordered in the following January that during the continuance of hostilities, any vessel of war of either belligerent entering an English port should 'be required to depart and to put to sea within twenty-four hours after her entrance into such port, except in case of stress of weather, or of her requiring provisions, or things necessary for the subsistence of her crew, or repairs;' in either of which cases the authorities of the port were ordered 'to require her to put to sea as soon as possible after the expiration of such period of twenty-four hours.' In 1870 the same rule was laid down; and the United States, unwilling to allow to others the license which she permitted to herself, adopted an identical resolution. It is perhaps not unlikely soon to become general.

Hall, pp. 652, 653; Bernard, 270; Neut. Laws Commissioner's Rep., Appendix No. vi; State Papers, lxxi, 167, 1871.

France stands at the other extreme of the scale of advance in the definition of neutral duties, \* \* \* not even limiting the stay in her ports of belligerent ships of war not accompanied by prizes to 24 hours or any other time; \* \* \* We must therefore admit that the rule of 24 hours' stay, and the limits which as above mentioned have been set by many states to their supply of coal, are not yet a part of international law; but the amount of recognition which they have received would lend very great weight to any complaint which a belligerent might make on principle of conduct by a neutral power not in conformity with them.

Westlake, vol. 2, p. 242.

We now pass on to a consideration of the duty incumbent on a neutral power *to prevent an undue stay of belligerent war-ships and their prizes in its ports and waters.* \* \* \* The question of length of stay is far more important, and must receive more detailed treatment. Not till 1862 was it made matter of formal regulation published beforehand, and then by one power only. In that year Great Britain, being neutral in the American Civil War, announced that no belligerent war-ship might remain in one of her ports longer than twenty-four hours, unless special permission was obtained for such a purpose as coaling or effecting repairs. Many other powers have since followed the British example; but France has never adopted it save in the case of a cruiser accompanied by a prize, and Germany has desired to confine a definite period to ports situated within the theatre of war, leaving neutrals at liberty to fix their own time with regard to more distant harbors. In 1907 the Second Hague Conference agreed after long discussion on the twenty-four hours rule for all ordinary cases "in default of special provisions to the contrary in the laws of a neutral power." It thus indicated that the British practice might with advantage become undoubted law, but provided a means of escape from it in deference to the objections of a few powers. Even so Germany was not satisfied, and entered a reservation against the article.

Lawrence, p. 639-640.

Asylum can, secondly, be abused by wintering in a port in order to wait for other vessels of the same fleet, or by similar intentional delay. There is no doubt that neutrals must prohibit this abuse by ordering such belligerent men-of-war to leave the neutral ports. Following the example set by Great Britain in 1862, several maritime States have adopted the rule of not allowing a belligerent man-of-war to stay in their neutral ports for more than twenty-four hours, except on account of damage or stress of weather.

Oppenheim, vol. 2, pp. 421-422.

A neutral would certainly violate his duty of impartiality if he were to allow belligerent men-of-war to winter in his ports or to stay there for the purpose of waiting for other vessels of the fleet or transports.

Oppenheim, vol. 2, p. 404.

Asylum can, lastly, be abused by remaining in a neutral port an undue length of time in order to escape attack and capture by the other belligerent. Neutral territorial waters are in fact an asylum for men-of-war which are pursued by the enemy, but, since nowadays a right of pursuit into neutral waters, as asserted by Bynkershoek, is no longer recognised, it would be an abuse of asylum if the escaped vessel were allowed to make a prolonged stay in the neutral waters. A neutral who allowed such abuse of asylum would violate his duty of impartiality, for he would assist one of the belligerents to the disadvantage of the other.

Oppenheim, vol. 2, p. 422.

\* \* \* when after the battle of Port Arthur in August 1904, the Russian battleship *Cesarewitch*, the cruiser *Novik*, and three de-



stroyers escaped, and took refuge in the German port of Tsing-Tau in Kiao-Chau, the *Novik*, which was uninjured, had to leave the port after a few hours.

Oppenheim, vol. 2, p. 423.

If any ship of war or privateer of either belligerent shall, after the time this notification takes effect, enter any port, harbor, roadstead, or waters of the United States, such vessel shall be required to depart and to put to sea within twenty-four hours after her entrance into such port, harbor, roadstead, or waters, except in case of stress of weather or of her requiring provisions or things necessary for the subsistence of her crew, or for repairs; in either of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; \* \* \*

Proclamation of President Grant, October 8, 1870, For. Rel. 1870, 48. See also Proclamation of President Roosevelt, February 11, 1904.

The Pacific fleet, under Commodore George Dewey, had lain for some weeks at Hongkong. Upon the colonial proclamation of neutrality being issued and the customary twenty-four hours' notice being given, it repaired to Mirs Bay, near Hongkong, whence it proceeded to the Philippine Islands under telegraphed orders to capture or destroy the formidable Spanish fleet then assembled at Manila.

President McKinley, annual message, December 5, 1898, For. Rel. 1898, LVIII.

Articles 12 and 13, Hague Convention V, 1907, are substantially identical with section 132, 133, respectively, Austro-Hungarian Manual, 1913.

#### Contra.

Under Article XVII. of the treaty with France of 1778, the men-of-war of the enemies of France were forbidden to bring their prizes into the ports of the United States, and a direction for the enforcement of this obligation was embraced in the instructions to collectors of customs of Aug. 4, 1793. But, with this exception, belligerent men-of-war were permitted to enter the ports of the United States by the letter of Sept. 9, 1793, "which concedes to them our ports as a refuge in case of necessity and a resort for comfort or convenience, without limiting the time of their stay."

Moore's Digest, vol. vii, p. 985; Mr. Randolph, Secretary of State, to governor of Virginia, May 8, 1795.

#### Contra as to time.

During the American Civil War the Dutch Government issued instructions permitting men-of-war of the belligerents to remain in the ports of the Dutch West Indies not more than 48 hours.

Baron Van Zuylen, Dutch minister of foreign affairs to Mr. Pike, American minister at The Hague, October 29, 1861.

#### Effect of armistice.

"I have the honor to inform you that on the 22nd ultimo I received the following telegram of that date from Mr. Harris, United States

consul at Nagasaki: 'Ascertain if Japanese Government will allow dock-yard company here to dock ships of our fleet during armistice. Answer soon as possible.'

"From an interview had with the vice-minister for foreign affairs it is clear that the Japanese Government are strongly convinced that, the present being an armistice and not definite peace, the relation of neutral and belligerent remains unchanged; and that therefore they could not without a breach of neutrality allow the docking of United States war vessels in a Japanese port.

"Mr. Harris was accordingly on the 24th ultimo answered by wire in the negative. He has since informed me that his telegram to me was sent in view of a telegram to him from Admiral Dewey requesting him to ascertain whether ships of the fleet could be docked at Nagasaki during the armistice, and desiring a speedy reply.

Mr. Buck, minister to Japan, to Mr. Day, Secretary of State, September 6, 1898, Moore's Digest, vol. vii, pp. 1085, 1086.

#### Effect of armistice.

September 21, 1898, after the conclusion of the general armistice between the United States and Spain, the Department of State instructed the embassy of the United States in London that it was desired to send the small light-draft gunboat *Helena* to China for river service, for which purpose she was expressly built, and that she would sail about October 1st, touching at Bermuda, Madeira, and Gibraltar. The embassy was instructed to ask permission for the vessel to visit Bermuda and Gibraltar and coal there, with the understanding that she "does not reinforce Asiatic Squadron for operations against Spain should hostilities be resumed."

The desired permission was granted by the British Government on the understanding expressed in the application.

Moore's Digest, vol. vii, p. 1086, For. Rel. 1898, 1005.

#### Effect of armistice.

By the protocol between the United States and Spain, concluded at Washington, August 12, 1898, hostilities were immediately suspended, and it was provided that commissioners should meet at Paris to treat of peace. Subsequently the U. S. S. *Marietta*, on visiting the Dutch port of Curaçao, in the West Indies, was, after a stay of forty-four hours, requested to depart. The American minister at The Hague was instructed to bring the matter to the attention of the Dutch Government and to inquire whether it regarded its neutrality proclamation as being strictly applicable during the existing truce and when the treaty of peace seemed to be on the eve of consummation. It was stated that other neutral powers had treated the armistice between the United States and Spain as a practical end of the war, and had admitted public ships of the United States freely to enter their ports for docking, taking on supplies, and for other purposes.

Moore's Digest, vol. vii, p. 1086; Mr. Hay, Secretary of State, to Mr. Newel, minister to the Netherlands, February 8, 1899.

DAMAGES OR STRESS OF WEATHER AS AFFECTING LENGTH OF STAY OF BELLIGERENT VESSEL IN NEUTRAL PORT—EXCEPTION AS TO VESSELS DEVOTED TO RELIGIOUS, SCIENTIFIC, OR PHILANTHROPIC PURPOSES.

A belligerent war-ship may not prolong its stay in a neutral port beyond the permissible time except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

The regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters, do not apply to war-ships devoted exclusively to religious, scientific, or philanthropic purposes.—*Hague Convention XIII*, 1907, Article 14.

Refuge from the perils of the sea shall be granted to war-ships of belligerents only so long as the danger lasts.

Institute, 1898, p. 155.

But it is agreed—and article 14 of Convention XIII. enacts it—that belligerent men-of-war, except those exclusively for the time devoted to religious, scientific, or philanthropic purposes, must not prolong their stay in neutral ports and waters beyond the time permitted, except on account of damage or stress of weather.

Oppenheim, vol. 2, pp. 403-404.

Such vessel or vessels [of war of the United States sheltered in a neutral port] must conform to the regulations prescribed by the authorities of the neutral port with respect to \* \* \* the limitation of the stay of the vessel in port.

U. S. Naval War Code, Article 18.

Article 14, Hague Convention XIII, 1907, is substantially identical with section 134, Austro-Hungarian Manual, 1913.

During the war between the United States and Spain an interesting question arose as to the U. S. S. *Monocacy* in China. By communications of the Tsung-li yamen to Mr. Denby, United States minister at Peking, of May 2 and May 9, 1898, official announcement was made that the yamen had telegraphed the viceroys, governors, and taotais-general of the Yangtze and maritime provinces to instruct their subordinates to observe the laws of neutrality. In the communication of the 9th of May it was stated that, in due observance of international law, vessels of war of the belligerents would not be allowed to "anchor in Chinese ports." In the proclamation of the taotai of Shanghai, issued May 22, 1898, it was more precisely declared that such vessels must not use Chinese-controlled waters and ports for anchorage or fighting purposes, or anchor there for lading war supplies; and that, should any such vessel enter a Chinese port, except under stress of weather or for necessary food or repairs, it must not remain over twenty-four hours. A question having arisen as to the applicability of these provisions to the *Monocacy*, an antiquated ship of war of light draft, which had,

because of her adaptation to river service, for years been kept in Chinese waters for the protection of American citizens, the Government of the United States maintained (1) that, as the circumstances of her long-continued employment and her unfitness for service at sea rendered it apparent that her presence was not connected with the war, she did not come within the operation of rules designed to prevent the use of neutral waters as a base of hostilities, and (2) that the existence of war between the United States and a third power could not deprive the former of the right to take the customary measures for the protection of its citizens in China.

Moore's Digest, vol. vii, p. 991; Mr. Day, Secretary of State, to Mr. Denby, minister to China, June 7, 1898; Proclamation and Decrees during the War with Spain, 18-20.

An incident of the early stages of the war between the United States and Spain suggests the need of an amplification of the rule by which a belligerent man-of-war is required, except in case of stress of weather or of need of provisions or repairs, to leave a neutral port within twenty-four hours after her arrival. On May 11, 1898, Captain Cotton, of the auxiliary cruiser *Harvard*, cabled from St. Pierre, Martinique, to the Secretary of the Navy that the Spanish torpedo-boat destroyer *Furor* had touched during the afternoon at Fort de France, Martinique, and had afterwards left, destination unknown, and that the governor had ordered him not to sail within twenty-four hours from the time of the *Furor's* departure. At noon on the 12th of May Captain Cotton was informed by the captain of the port at St. Pierre that the *Furor* had about 8 a. m. again called at Fort de France and would leave about noon and that he might go to sea at 8 p. m.; but that if he did not do so he would be required to give the governor twenty-four hours' notice of his intention to leave the port. On the same day Captain Cotton received information which led him to telegraph to the Secretary of the Navy that he was closely observed and blockaded at St. Pierre by the Spanish fleet, and that the Spanish torpedo-boat destroyer *Terror* was at Fort de France. Later Captain Cotton cabled that the Spanish consul protested against his stay at St. Pierre, and that he had requested permission to remain a week to make necessary repairs to machinery. Replying to these reports, the Secretary of the Navy telegraphed to Captain Cotton as follows: "Vigorously protest against being forced out of the port in the face of a superior blockading force, especially as you were detained previously in the port by the French authorities because Spanish men-of-war had sailed from another port. Also state that United States Government will bring the matter to the attention of the French Government. Urge the United States consul to protest vigorously." It proved to be unnecessary to take further action. Captain Cotton's request for time was granted. The governor showed no disposition to force him out of port, only requiring twenty-four hours' notice of an intention to sail; and the dangers to which the *Harvard* seemed to be exposed soon disappeared. It may be observed, however, that as the enforcement, under circumstances such as were described, of the twenty-four hours' limit would constitute a negation of the admitted privilege of asylum it is not likely that it would be held to be applicable in such a situation.

Moore's Digest, vol. vii, pp. 990, 991; Naval Operations of the War with Spain, 383-389, 407-410.

LIMITATION AS TO NUMBER OF BELLIGERENT WAR-VESSELS SIMULTANEOUSLY IN  
NEUTRAL PORT.

In the absence of special provisions to the contrary in the legislation of a neutral Power, the maximum number of war-ships belonging to a belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall be three.—*Hague Convention XIII, 1907, Article 15.*

The stay of war-ships may be undue with regard to the number permitted in a neutral port at any one time or the length of the period during which they are allowed to remain. Fixed rules for these matters are comparatively modern. Neutral sovereignty involves a right of control, and of old each neutral dealt with them as occasions arose, the only limitation on its freedom of action being the elastic principle that it must not permit its ports and waters to be made into havens of rest or depots of supply for belligerent fleets. Sometimes a power declined to allow more than three war-ships of a foreign state to enter any of its ports at once in time of peace without special permission. At the Second Hague Conference this was taken as a rule applicable to times of war. \* \* \* But it reserved power to the neutral government to make special provisions to the contrary. Consequently nothing further has been done than to obtain general recognition of a normal standard, which is doubtless an advance on the old laxity, but does not amount to the enactment of a definite rule.

Lawrence, p. 639.

\* \* \* since a neutral must prevent belligerents from making his territory the base of military operations, he must not allow an unlimited number of men-of-war belonging to one of the belligerents to stay simultaneously in one of his ports.

Oppenheim, vol. 2, p. 418.

Vessels of war of the United States may take shelter during war in a neutral port, subject to the limitations that the authorities of the port may prescribe as to the number of belligerent vessels to be admitted into the port at any one time.

U. S. Naval War Code, 1900, Article 17.

Article 15, Hague Convention XIII, 1907, is substantially identical with section 135, Austro-Hungarian Manual, 1913.

REGULATIONS AS TO DEPARTURE FROM NEUTRAL PORT OF OPPOSING BELLIGERENT  
WAR-SHIPS.

When war-ships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.

The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.

A belligerent war-ship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant-ship flying the flag of its adversary.—*Hague Convention XIII, 1907, Article 16.*

\* \* \* and when she [a vessel of either party] proceeds to sea, no enemy shall be allowed to pursue her from the same port within twenty-four hours after her departure.

Treaty of Peace and Amity between the United States and Tripoli, June 4, 1805, Article X.

If we shall be at war with any Christian Power, and any of our vessels sail from the ports of the United States, no vessel belonging to the enemy shall follow until twenty-four hours after the departure of our vessels; and the same regulations shall be observed toward the American vessels sailing from our ports, be their enemies Moors or Christians.

Treaty of Peace and Friendship, concluded between the United States and Morocco, September 16, 1836, Article XI.

If two enemy ships shall be ready to leave a neutral port simultaneously, the local authorities shall set a sufficient interval, twenty-four hours at least, between their sailings. The right of leaving first shall belong to the ship which entered first, or, if it does not want to use this right, to the other, on condition that the latter requests it of the local authorities, which shall give the permission if the adversary, duly advised, shall insist upon remaining. If, upon the departure of a belligerent ship, one or more enemy ships are signaled, the departing ship shall be warned and may be readmitted to the port, there to await the entrance or the disappearance of the others.

Institute, 1898, p. 155.

The government of the United States was warranted by the law and practice of nations, in the declarations made in 1793, of the rules of neutrality, which were particularly recognized as necessary to be

observed by the belligerent powers, in their intercourse with this country. These rules were \* \* \*. And if the armed vessel of one nation should depart from our jurisdiction, no armed vessel, being within the same, and belonging to an adverse belligerent power, should depart until twenty-four hours after the former, without being deemed to have violated the law of nations.

Kent, vol. 1, pp. 129-130; Instructions to the collectors of the customs, August 4, 1793.

It is usual, and indeed necessary, in order to prevent an undue use of neutral waters as asylum, to establish a rule as to the departure of hostile belligerents lying in a neutral port at the same time. Twenty-four hours' delay is now often exacted of one belligerent after the other shall have sailed, which, in case of steamers, is sufficient. And, if a cruiser is within the neutral waters, though not in port, the neutral may convoy the belligerent in port beyond its waters, and insist that the other shall keep within the waters for a reasonable time thereafter.

Note 208, Dana's Wheaton.

Armed cruisers, in neutral ports, are not only bound not to violate the peace while within neutral jurisdiction, but they cannot use the asylum as a shelter from which to make an attack upon the enemy. Hence, if an armed vessel of one belligerent should depart from a neutral port, no armed vessel, being within the same, and belonging to an adverse belligerent power, can depart until twenty four hours after the former, without being deemed to have violated the law of nations. And if any attempt at pursuit be made, the neutral is justified in resorting to force, to compel respect to the sanctity of its neutrality.

Halleck, p. 526-527.

\* \* \* if a belligerent can leave a port at his will, the neutral territory may become at any moment a mere trap for an enemy of inferior strength. Accordingly, during a considerable period, though not very generally or continuously, neutral states have taken more or less precaution against the danger of their waters being so used. Perhaps the usual custom until lately may be stated as having been that the commander of a vessel of war was required to give his word not to commit hostilities against any vessel issuing from a neutral port shortly before him, and that a privateer as being less a responsible person was subjected to detention for twenty-four hours. The disfavour however with which privateers have long been regarded has not infrequently led to their entire exclusion, save in cases of danger from the sea or of absolute necessity; and the twenty-four hours' rule has been extended to public ships of war by Italy, France, England, the United States, and Holland. Probably it may now be looked upon as a regulation which is practically sure to be enforced in every war.

Hall, pp. 651, 652.

It [the rule of 24 hours interval between the departure from a neutral port of two ships of mutually enemy character] has been adopted in recent declarations of neutrality or other official documents as follows. As between any two ships of mutually enemy

character, in 1898 by Brazil (with the addition that the interval shall be 72 hours if the ship first departing is a sailing vessel and that secondly departing a steamer), China, Italy (which also has the rule in Art. 250 of its Mercantile Marine Code), the Netherlands and Russia, and in 1904 by France; also by the Belgian decree of 18 February 1901, Art. 19. Where the ship secondly departing is one of war, by Great Britain and Denmark in 1898 and 1904, Portugal in 1898, and Sweden and Norway and Egypt in 1904 (the latter with the addition that no vessel of one of the belligerents shall leave either of the terminal ports of the Suez Canal less than 24 hours after a ship of war of the other belligerent has left the same port); also by Spain in 1863. And in 1898 Haiti and Japan promulgated the 24 hours' interval only as between the departure of mutually enemy ships of war.

\* \* \* And the French instructions of 1904 provide that belligerent ships in a French port must abstain from all enquiry as to the forces, position or resources of their enemies, and must not put to sea hastily (*brusquement*) in order to pursue those which may be signalled.

We may sum up by saying that the rule of 24 hours' interval is advanced far enough towards universal acceptance for a belligerent to have just cause of complaint against a neutral, if a vessel of his should be captured by a ship of war of his enemy which had been allowed to depart from a port of that power within 24 hours after her.

Westlake, vol. 2, pp. 236, 237.

The [Second Hague] Conference also prescribed the course to be followed when ships of both belligerents were present at the same time in the same neutral port or roadstead. If both were war-ships, it followed the old rule that has come down to us from the sixteenth century, and prescribed that twenty-four hours must elapse between their respective departures.

Lawrence, p. 640.

A neutral must prevent a belligerent man-of-war from leaving a neutral port at the same time as an enemy man-of-war or an enemy merchantman, or must make other arrangements which prevent an attack so soon as both reach the Open Sea.

Oppenheim, vol. 2, p. 401.

\* \* \* belligerent men-of-war are expected to comply with all orders which the neutral makes for the purpose of preventing them from making his ports the base of their operations of war, as, for instance, with the order not to leave the ports at the same time as vessels of the other belligerent. And, if they do not comply voluntarily, they may be made to do so through application of force, for a neutral has the duty to prevent by all means at hand the abuse of the asylum granted.

Oppenheim, vol. 2, p. 419.

A belligerent man-of-war can abuse asylum, firstly, by ascertaining whether and what kind of enemy vessels are in the same neutral port, accompanying them when they leave, and attacking them immediately they reach the Open Sea. To prevent such abuse, in the eighteenth century several neutral States arranged that, if bel-



ligerent men-of-war or privateers met enemy vessels in a neutral port, they were not to be allowed to leave together, but an interval of at least twenty-four hours was to elapse between the sailing of the vessels. During the nineteenth century this so-called twenty-four hours rule was enforced by the majority of States.

Oppenheim, vol. 2, p. 421.

\* \* \* no ship of war or privateer of either belligerent shall be permitted to sail out of or leave any port, harbor, or roadstead, or waters subject to the jurisdiction of the United States from which a vessel of the other belligerent (whether the same shall be a ship of war, a privateer, or a merchant ship) shall have previously departed, until after the expiration of at least twenty-four hours after the departure of such last mentioned vessel beyond the jurisdiction of the United States.

Proclamation of President Grant, October 8, 1870, For. Rel. 1870, 48.  
See also proclamation of President Roosevelt, February 11, 1904.

No ship of war or privateer of either belligerent shall be detained in any port, harbor, roadstead, or waters of the United States more than twenty-four hours, by reason of the successive departures from such port, harbor, roadstead, or waters of more than one vessel of the other belligerent. But if there be several vessels of each or either of the two belligerents in the same port, harbor, roadstead, or waters, the order of their departure therefrom shall be so arranged as to afford the opportunity of leaving alternately to the vessels of the respective belligerents, and to cause the least detention consistent with the objects of this proclamation.

Proclamation of President Grant, October 8, 1870, For. Rel. 1870, 48.  
See also proclamation of President Roosevelt, February 11, 1904.

Such vessel or vessels [of war of the United States sheltered in a neutral port] must conform to the regulations prescribed by the authorities of the neutral port with respect to \* \* \* the time to elapse before sailing in pursuit or after the departure of a vessel of the enemy.

U. S. Naval War Code, Article 18.

Article 16, Hague Convention V, 1907, is substantially identical with section 136, Austro-Hungarian Manual, 1913.

*Commodore Stewart's Case, 1 Ct. Cl., 113.*—The court said: “\* \* \* when two vessels, enemies of each other meet in a neutral port, or one pursues the other into such port, not only must they refrain from all hostilities while they remain there, but should one set sail, the other must not sail in less than twenty-hours afterwards.”

REPAIRS AND ADDITIONS TO BELLIGERENT WAR-SHIPS IN NEUTRAL PORTS AND  
ROADSTEADS.

In neutral ports and roadsteads belligerent war-ships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.—*Hague Convention XIII, 1907, Article 17.*

**Contra.**

When the subjects and inhabitants of the two parties, with their vessels, whether they be public and equipped for war, or private or employed in commerce, shall be forced by tempest, by pursuit of privateers and of enemies, or by any other urgent necessity, to retire and enter any of the rivers, bays, roads, or ports of either of the two parties, they shall be received and treated with all humanity and politeness, and they shall enjoy all friendship, protection, and assistance, and they shall be at liberty to supply themselves with refreshments, provisions, and everything necessary for their sustenance, for the repair of their vessels, and for continuing their voyage; provided allways that they pay a reasonable price; and they shall not in any manner be detained or hindered from sailing out of the said ports or roads, but they may retire and depart when and as they please, without any obstacle or hindrance.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, Article XXI.

If the citizens or subjects of either party, in danger from tempests, pirates, enemies, or other accidents, shall take refuge, with their vessels or effects, within the harbours or jurisdiction of the other, they shall be received, protected, and treated with humanity and kindness, and shall be permitted to furnish themselves, at reasonable prices, with all refreshments, provisions, and other things necessary for their sustenance, health, and accom[m]odation, and for the repair of their vessels.

Treaty of Amity and Commerce concluded between the United States and Prussia, July 11, 1799, Article XVIII.

Repairs shall not be allowed except so far as necessary to enable them [belligerent war-ships in neutral ports] to put to sea. Immediately thereafter the ship shall leave the port and neutral waters.

Institute, 1898, p. 155.

The government of the United States was warranted by the law and practice of nations, in the declarations made in 1793, of the rules of neutrality, which were particularly recognized as necessary to be observed by the belligerent powers, in their intercourse with this country. These rules were, \* \* \*. The equipment by them of government vessels of war, in matters which, if done to other vessels, would be applicable equally to commerce or war, was lawful.

Kent, vol. 1, pp. 129-130; Instructions to the collectors of the customs, August 4, 1793.

It may be considered the settled practice of nations, intending to be neutral, to prohibit belligerent cruisers from entering their ports, except from stress of weather or other necessity, or for the purpose of obtaining provisions and making repairs requisite for seaworthiness.

Note 208, Dana's Wheaton.

The same spirit of humanity, as well as respect for a friendly power, imposes on neutrals the duty of opening their ports to armed vessels of both belligerents, for purposes having no direct relation to the war, and equally likely to exist in time of peace. Cruisers may sail into neutral harbors for any of the purposes for which merchant vessels of either party frequent the same places, except that merchant vessels are suffered to take military stores on board, which is forbidden generally, and ought to be forbidden, to ships of war.

Woolsey, p. 273.

Hence, although a ship may be sold in a neutral country to a belligerent, as an article of commerce, the augmentation of a cruiser's force in such a country will taint all its captures brought into such a country's ports during its cruise.

Woolsey, p. 276.

In every other case but those just considered a belligerent ship of war may need repair, \* \* \* and it has never been claimed that so much repair \* \* \* must be refused her as will enable her to keep the sea.

Westlake, vol. 2, p. 239.

In addition to the duties previously mentioned, a neutral state is bound *to prevent an increase of the fighting force of belligerent war vessels in its ports and roadsteads*. This wholesome rule had been generally recognised for a long time when the Second Hague Conference embodied it in a law-making document. The question of repairs is bound up with it, and the Convention of 1907 on the Rights and Duties of Neutral Powers in Maritime War laid down that \* \* \* [Article 17]. This is the old distinction, sadly illogical, but nevertheless useful for practical purposes. What fits a vessel to keep the seas also fits it to manoeuvre in an engagement, and overtake or escape an enemy. But nevertheless it is possible for experts to distinguish between repairs mainly concerned with navigation and repairs mainly concerned with fighting power; and as the Conference made the local authorities of the neutral state judges of what repairs are necessary, and provided that they must be carried out as quickly as possible, the danger of abuse is reduced to a minimum.

Lawrence, p. 642.

If a belligerent ship comes into a neutral port in such a condition that a long time would be required to make her seaworthy, she should be disarmed before repairs are permitted, and detained in safe custody until the end of the war, when the work on her is finished. This was the course pursued in 1904, during the Russo-Japanese war, with regard to the Russian cruiser *Lena*, which put into the American port of San Francisco in a badly damaged condition; and in her case proceedings were simplified by a written request for internment from her commanding officer.

Lawrence, p. 642.

**Contra.**

Asylum can, thirdly, be abused by repairing a belligerent man-of-war which has become unseaworthy. Although small repairs are allowed, a neutral would violate his duty of impartiality by allowing such repairs as would make good the unseaworthiness of a belligerent man-of-war. During the Russo-Japanese War this was generally recognised, and the Russian men-of-war *Askold* and *Grossovoi* in Shanghai, the *Diana* in Saigon, and the *Lena* in San Francisco had therefore to be disarmed and detained. The crews of these vessels had likewise to be detained for the time of the war.

Oppenheim, vol. 2, p. 422.

**Repairs of war damage inadmissible.**

The Buenos Ayrean privateer *Juncal* put in at Baltimore for the purpose of making repairs after an action at sea with a Brazilian cruiser. Under these circumstances, the collector of customs at Baltimore was instructed: "Whilst you will not fail to allow her the usual hospitality, and to procure the necessary refreshments, the President directs that you will be careful in preventing any augmentation of her force and her making any repairs not warranted by law. With respect to the latter article, the reparation of damages which she may have experienced from the sea is allowable, but the reparation of those which may have been inflicted in the action is inadmissible."

Moore's Digest, vol. vii, pp. 991, 992; Mr. Clay, Secretary of State, to Mr. McCulloch, April 7, 1828.

It was held by the Attorney General in 1844 that a foreign belligerent vessel might make repairs in a port of the United States, without violating the neutrality laws.

4 Op. Atty. Gen., 336.

This shelter [of United States war vessels in a neutral port], which is allowed by comity of nations, may be availed of for the purpose of evading an enemy, from stress of weather, or to obtain supplies or repairs that the vessel needs to enable her to continue her voyage in safety and to reach the nearest port of her own country.

U. S. Naval War Code, 1900, Article 17.

Article 17, Hague Convention XIII, 1907, is substantially identical with section 137, Austro-Hungarian Manual, 1913.

On August 12, 1904, the Russian cruiser *Askold* and the Russian torpedo-boat destroyer *Grozovoi*, which had escaped from Port Arthur, arrived at Shanghai, where they sought to obtain repairs. On the 17th of August they were visited by Chinese officials, who reported that the repairs of the *Grozovoi* would consume eighteen days and those of the *Askold* twenty-eight. On the 19th of August the taotai notified the Russian consul-general that the vessels had been in Shanghai seven days, and that he would require the *Grozovoi* to leave within twenty-four hours and the *Askold* to complete her repairs within forty-eight hours, and to go out within twenty-four thereafter. This demand the Russian consul-general refused. \* \* \* The taotai at Shanghai subsequently notified the Russian consul-general that both boats must complete their repairs by noon of the 23rd of August and leave immediately thereafter. The Russian consul-general again refused to comply with the taotai's demand, and, as the repairs were being executed by a British company, over which the taotai had no control, the latter applied to the British consul-general, in order that the work might be stopped. The British consul-general, after consultation with the Russian consul-general, gave notice that work would stop on the 24th of August. On that day the taotai received a dispatch from the Russian consul-general to the effect that both vessels were to be disarmed. \* \* \*

\* \* \* the Japanese Government on the 19th of August notified Peking that the Russian ships should be required to leave Shanghai, either immediately or, if necessary, after two days' repairs to make them seaworthy; and that, if they were unwilling to leave Shanghai, they should be disarmed without making any repairs and detained in port till the conclusion of the war. In the event of China's failure to enforce either of these three alternatives, the Japanese Government reserved the right to take such self-protective measures as it might deem necessary, responsibility for the consequences to rest with China. Subsequently, in view of the difficult position of the Chinese Government, Japan consented to a delay till the 21st of August; and when the Chinese Government granted on the 23rd of August an extension for repairs and for the departure of the ships till noon of the 28th, the Japanese Government again protested.

Moore's Digest, vol. vii, pp. 997, 998; For. Rel. 1904, 137-146, 426.

In August, 1904, Dr. von Mühlberg, imperial acting secretary of state for foreign affairs, stated that the Russian ships which had taken refuge at Tsingtau, including the battle ship *Cesarevitch* and three torpedo boats, had been disarmed by the German authorities and would not be allowed to repair. Dr. von Mühlberg remarked that the principles of international law with regard to the repair

of belligerent ships in neutral ports were very difficult of application, but that, while it could not be laid down that Germany would under no circumstances allow belligerent ships to repair in her ports, it had been decided in the present instance not to allow it to be done, and that he had reason to believe that the British Government would act in a similar case as the German Government had done. As to the officers and men belonging to the Russian ships, and numbering about 1,000, the Japanese Government had been asked whether it objected to their being sent to Russia under proper safeguards.

Moore's Digest, vol. vii, p. 998, 999; For. Rel. 1904, 323.

September 13, 1904, the Russian ambassador and the Japanese minister at Washington both advised the Department of State of the arrival at San Francisco of the Russian transport or auxiliary cruiser *Lena*, with a crew of 500 men and an armament of 27 quick-firing guns. The Russian ambassador stated that the vessel was in an unseaworthy condition, and asked that she might receive all aid compatible with neutrality. The Japanese minister asked that "appropriate measures" be taken. On September 14 the Russian ambassador was advised that if the vessel was repaired, only such bare repairs could be allowed as might be necessary to render the vessel seaworthy and enable her to reach the nearest home port, and that even such repairs could be permitted only on condition that they should not prove to be too extensive; that an inspection made by United States officers at San Francisco showed that the repairs asked for included a complete outfit of new boilers and the reconstruction of engines, which would consume at least four or five months, or, according to the captain's estimate, eight months, and amount to a renovation of the vessel. It was declared that this could not be allowed with a due regard to neutrality, and an immediate answer was desired as to whether the Russian Government preferred to have the limited repairs made or to have the vessel laid up at the Mare Island Navy-Yard. On the 15th of September the Russian ambassador asked for a delay of forty-eight hours, in order that he might receive the instructions of his Government, but he was advised in reply that the captain of the *Lena* had informed the American naval authorities at San Francisco that the ship, being unseaworthy, must disarm, and had asked that she be allowed to make needed repairs.

Moore's Digest, vol. vii, p. 999; For. Rel. 1904, 428-430.

#### Repairs of war damage inadmissible.

June 3, 1905, three Russian men-of-war, the *Aurora*, the *Oleg*, and the *Zemtchug*, after an engagement with the Japanese, sought asylum at Manila. The commander of the squadron, Admiral Enquist, stated that the *Aurora* and the *Oleg* were seriously damaged, and that the *Zemtchug* was in bad condition; and he requested permission to make repairs and to fill up with provisions and coal. On board the ships there were a hundred and thirty wounded men. Permission was at once granted by the local authorities for the landing of a number of these; and an examination was made by a United States naval board of the condition of the ships. It was found that the *Aurora* and the *Oleg*, which were seriously injured near the water line, would require, respectively, thirty and fifty days to repair, while the *Zemtchug* would require seven; and that none of them

had coal enough to steam. Admiral Enquist desired three thousand tons of coal. The facts were immediately reported by the authorities in the Philippines to the War Department and the Navy Department, by which they were in turn communicated to the Department of State.

In a memorandum of June 5, 1905, Mr. W. L. Penfield, then solicitor of the Department of State, after referring (1) to Art. VI of the treaty of Washington of May 8, 1871, by which it is declared that a neutral government is bound not to permit either belligerent to make use of its ports or waters as the base of naval operations against the other or for the purpose of renewal or augmentation of supplies of arms and munitions of war or the recruitment of men; (2) to the clause in the President's neutrality proclamation of Feb. 11, 1904, limiting the stay of belligerent men-of-war to twenty-four hours, except in certain cases; (3) to the similar clause in the British neutrality proclamation issued during the Spanish-American war; and (4) to the clause in the neutrality rules promulgated by the Italian Government in 1864, and again in 1898, forbidding the increase, under pretext of repairs, of warlike force by belligerent ships, or the execution, under such pretext, of any work that could in any way add to their fighting strength, expressed the opinion that the President's proclamation of February 11, 1904, in what it said concerning repairs of belligerent ships, referred only to damage caused by the sea and not to damage caused by war, and that, if the Russian ships were permitted to renew their fighting strength, either by the restoration of their guns or of their armor plate, or to repair any other damage caused by the guns of the Japanese fleet, the neutral port in which such things were allowed would become a naval arsenal for the belligerent and a base of his hostile operations. He adverted to the internment of the Russian cruiser *Lena* at San Francisco, in the summer of 1904, on the ground that the repairs which she required were so extensive as to amount to a renovation of the ship, although in that case there was no war damage to be repaired.

In conformity with the view taken in this memorandum, the Secretary of the Navy on the same day telegraphed to Admiral Train, commanding the United States Asiatic Fleet, then at Cavite, that the Russian vessels could not be allowed to repair war damages unless interned, it being the policy of the United States to restrict all belligerent operations in its ports. Admiral Train was instructed to confer with Mr. Wright, governor-general of the Philippines, and if he approved to take charge of the vessels.

On the next day, June 6, the War Department instructed Governor Wright to advise Admiral Enquist that as his ships were suffering from damage due to battle and as it was the policy of the United States to restrict all operations of belligerents in neutral ports, the President could not consent to any repairs unless the ships were interned at Manila till the close of hostilities. Governor Wright was further directed, after notifying Admiral Enquist of this conclusion, to turn over the execution of the order to Admiral Train.

In reporting on June 6 the execution of these orders, Governor Wright stated that Admiral Enquist, on being advised of the ruling as to repairs, had expressed a wish to cable his government on the subject, and had asked whether he would be required to put to sea within twenty-four hours or would be allowed to obtain coal and

provisions sufficient to take him to his nearest port. The ships, said Governor Wright, had been allowed to take only 150 tons of coal for use in the harbor, and enough food supplies to last from day to day. Governor Wright also stated that he had just received a communication from the Japanese consul at Manila calling attention to the fact that three Russian war ships had been in the harbor since the night of June 3, and asking whether the 24-hour limit would be enforced. He had replied that, in view of the condition of the ships and of their request for coal and repairs, he was awaiting instructions.

With reference to this report the War Department, on the same day, instructed Governor Wright that the President directed that the 24-hour limit must be strictly enforced, and that the necessary supplies and coal must be taken within that time.

On June 9 Admiral Train reported that, as the Russian ships had not left the harbor within the required 24 hours, he had notified Admiral Enquist that the force under his command must be considered as interned after June 8 at noon. Admiral Train stated that disarmament was going on by removing the breech plugs, and that the engines were sufficiently disabled for the purpose of internment by limiting the coal supply. He added that Admiral Enquist, in accordance with instructions of his government, had expressed his willingness to give his parole and the paroles of his officers and men not to take any further part in the war.

Moore's Digest, vol. vii, pp. 992-994.

#### Effect of armistice.

On August 22, 1898, ten days after the conclusion of the general armistice between the United States and Spain, Mr. Hay, American ambassador in London, was instructed to "ascertain whether Admiral Dewey may dock, clean, and paint bottoms of vessels under his command at Hongkong. These operations," it was added, "could not under present circumstances be considered as connected with actual hostilities, but are in the nature of repairs affecting the preservation of vessels."

August 23 Mr. Hay replied that the British Government had telegraphed to the governor of Hongkong to accede to Admiral Dewey's application.

Moore's Digest, vol. vii, p. 1085; For. Rel. 1898, 1002.

#### Bond may be required as condition of allowing repairs.

*The Carlos Butterfield Claim, 2 Moore's International Arbitrations.*—In this case, an American vessel, outward bound, carrying a cargo of munitions of war, put into the Danish port of St. Thomas, for repairs. As a condition of allowing the repairs, the authorities required a bond that the vessel would not be employed for purposes of aggression against a power with which Denmark was at peace.

Held by the arbitrator that this measure of precaution was reasonable, in no sense oppressive, and that the authorities were warranted in taking precaution to prevent the possible violation of the neutrality of the port by acts of the nature of an equipment of armed vessels intended to operate against a friendly power.



OBTAINING WAR SUPPLIES, ARMAMENT, OR MEMBERS OF CREW, FORBIDDEN TO BELLIGERENT WAR-SHIPS, IN NEUTRAL PORTS, ROADSTEADS, OR WATERS.

Belligerent war-ships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.—*Hague Convention XIII, 1907, Article 18.*

Contra.

When the subjects and inhabitants of the two parties, with their vessels, whether they be public and equipped for war, or private or employed in commerce, shall be forced by tempest, by pursuit of privateers and of enemies, or by any other urgent necessity, to retire and enter any of the rivers, bays, roads, or ports of either of the two parties, they shall be received and treated with all humanity and politeness, and they shall enjoy all friendship, protection, and assistance, and they shall be at liberty to supply themselves with refreshments, provisions, and everything necessary for their sustenance, for the repair of their vessels, and for continuing their voyage; provided always that they pay a reasonable price; and they shall not in any manner be detained or hindered from sailing out of the said ports or roads, but they may retire and depart when and as they please, without any obstacle or hindrance.

Treaty of Amity and Commerce concluded between the United States and Sweden April 3, 1783, Article XXI.

Contra, apparently.

Vessels of either of the contracting parties shall have liberty, within the territories and dominions of the other, to complete their crew, in order to continue their voyage, with sailors articulated in the country, provided they submit to the local regulations and their enrolment be voluntary.

Treaty of Commerce and Navigation concluded between the United States and Italy, February 26, 1871, Article X.

A neutral Government is bound—

\* \* \* \* \*

Secondly, not to permit or suffer either belligerent to make use of its ports or waters \* \* \* for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Treaty of Washington, for the arbitration of the "Alabama Claims," concluded between the United States and Great Britain, May 8, 1871, Article VI.

Likewise the neutral State should not \* \* \* permit the military transports [of the belligerents] to use its ports or waters to renew or add to their military supplies, or arms, or to secure recruits.

Institute, 1875, p. 13.

Belligerent ships in a neutral port \* \* \* shall not take on reinforcements or recruit their military forces \* \* \*

Institute, 1898, p. 155.

A belligerent ship taking refuge in a neutral port from pursuit by the enemy, or after having been defeated by him, or because it has not a sufficient crew to remain at sea, shall remain therein until the end of the war. The same rule shall apply if it is carrying sick or wounded, and after having landed them, is in condition to go into action. The sick and wounded, though received and cared for, shall, after they have recovered, be also interned, unless considered unfit for military service.

Institute, 1898, p. 155.

They [belligerent cruisers in neutral ports] must not increase their armament or crew, or add to their belligerent efficiency.

Note 208, Dana's Wheaton, p. 524.

The armed cruisers of belligerents, while within the jurisdiction of a neutral state, \* \* \* cannot increase their guns or military stores, or augment their crews, not even by the enrollment of their own countrymen; \* \* \*

Halleck, p. 523.

**Exception as to completion of crew for navigation.**

It is scarcely an exception from the general prohibition to make levies in a neutral state that a belligerent ship entering a neutral port with a crew reduced from whatever cause to a number less than that necessary to her safe navigation may take on board a sufficient number of men to enable her to reach a port of her own country. In doing this, and no more, she does not become capable of being used as an engine of war, and consequently does nothing which the neutral state is bound to prevent as inconsistent with its neutrality. The matter of course stands otherwise if the limits of bare necessity are passed.

Hall, p. 623.

The augmentation in a neutral port of the naval strength of a belligerent power can take place as well by augmenting the strength of one of its own ships as by building a new one for it. The legal character of both operations depends on the same principles. \* \* \*

Westlake, vol. 2, p. 221.

It is however agreed that a belligerent ship of war must not enlist men in a neutral port, make it the base of an investigation into the force, situation or resources of the enemy, or receive in it such repairs or supplies as will increase her fighting strength beyond what it was when she came in.

Westlake, vol. 2, pp. 239, 240.

The fighting forces of a belligerent may not be reinforced or recruited in neutral territory, and supplies of arms and warlike stores or other equipments of direct use for war may not be obtained therein by belligerent warships. These prohibitions are imposed by International Law; and if a belligerent ignores them or a neutral suffers

them to be ignored, the aggrieved parties, whether neutral or belligerent, can demand reparation and take means to prevent a repetition of the offence.

Lawrence, p. 617.

**Exception as to completion of crew for navigation.**

A neutral must prevent a belligerent man-of-war, whose crew is reduced from any cause whatever, from enrolling sailors in his neutral ports, with the exception of such few hands as are necessary for the purpose of safely navigating the vessel to the nearest port of her home State.

Oppenheim, vol. 2, p. 401.

A neutral must prevent belligerent men-of-war admitted into his ports or maritime belt from replenishing with ammunition and armaments, and from adding to their armaments, as otherwise he would indirectly assist them in preparing for hostilities. And it makes no difference whether the ammunition and armaments are to come from the shore or are to be taken in from transport vessels.

Oppenheim, vol. 2, p. 403.

**Laws of United States.**

Every person who, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be deemed guilty of a high misdemeanor, and shall be fined not more than one thousand dollars and be imprisoned not more than one year.

Sec. 5285, Revised Statutes.

**British laws.**

If any person within the dominions of Her Majesty, and without the licence of Her Majesty:

By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which, at the time of her being within the dominions of Her Majesty, was a ship in the military or naval service of any foreign State at war with any friendly State.

Such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

British Foreign Enlistment Act, 1870, sec. 10.

**Contra, as to completion of crews.**

Vessels of either of the parties not armed, or armed previous to their coming into the ports of the United States, which shall not have infringed any of the foregoing terms, may lawfully engage or enlist therein their own subjects or citizens, not being inhabitants of the United States.

U. S. Treasury circular, August 4, 1793, 1 Am. State Papers, For. Rel. 140; Moore's Digest, vol. vii, p. 880.

It was held by the Attorney General in 1844 that the enlistment at New York of seamen or others for service on war vessels of Mexico (then at war with Texas), such persons not being Mexicans transiently within the United States, was a breach of the neutrality laws.

4 Op. Atty. Gen., 336.

\* \* \* no ship of war or privateer of either belligerent shall be permitted to make use of any port, harbor, roadstead, or other waters within the jurisdiction of the United States \* \* \* for the purpose of obtaining any facilities of warlike equipment. \* \* \*

Proclamation of President Grant, October 8, 1870, For. Rel. 1870, 48. See also proclamation of President Roosevelt, February 11, 1904.

No increase in the armament, military stores, or in the number of the crew of a vessel of war of the United States shall be attempted during the stay of such vessel in a neutral port.

U. S. Naval War Code, Article 18.

Article 18, Hague Convention XIII, 1907, is substantially identical with section 138, Austro-Hungarian Manual, 1913.

*Moodie v. The "Phoebe Anne,"* 3 Dall., 319.—In this case it was held that the fact that during the progress of purely nautical repairs, the guns of the vessel had been taken out and then replaced, did not constitute an augmentation of force.

"*The Brothers*," 17 Fed. Cases, No. 9743.—In this case it was held that the repairing of the waist of the vessel and the cutting of two ports for guns did not constitute an offense under section 5285, United States Revised Statutes.

**Augmentation of force, as affecting captures.**

*The "Santissima Trinidad,"* 7 Wheaton, 283.—In this case restitution of articles taken from Spanish vessels on the high seas was ordered because the capturing vessel illegally augmented her force in the ports of the United States by a substantial increase in her crew, and made the captures in question during her original cruise thereafter.

The Court said, however: "It has never been held by this court that an augmentation of force or illegal outfit affected any captures made after the original cruise was terminated."

See also *Talbot v. Jansen*, 3 Dallas, 133; *The Alerta*, 9 Cranch, 359; *The Estrella*, 4 Wheat., 298; *The Arrogente Barcelones*, 7 Wheat., 496; *La Concepcion*, 6 Wheat., 235; *The Santa Maria*, 7 Wheat., 490.

AMOUNT OF FOOD OR FUEL ALLOWED TO BELLIGERENT WAR-SHIP IN NEUTRAL PORT OR  
ROADSTEAD—TIME ALLOWED FOR COALING.

Belligerent war-ships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.—*Hague Convention XIII, 1907, Article 19.*

Contra as to limitation.

When the subjects and inhabitants of the two parties, with their vessels, whether they be public and equipped for war, or private or employed in commerce, shall be forced by tempest, by pursuit of privateers and of enemies, or by any other urgent necessity, to retire and enter any of the rivers, bays, roads, or ports of either of the two parties, they shall be received and treated with all humanity and politeness, and they shall enjoy all friendship, protection, and assistance, and they shall be at liberty to supply themselves with refreshments, provisions, and everything necessary for their sustenance, for the repair of their vessels, and for continuing their voyage; provided allways that they pay a reasonable price; and they shall not in any manner be detained or hindered from sailing out of the said ports or roads, but they may retire and depart when and as they please, without any obstacle or hindrance.

Treaty of Amity and Commerce concluded between the United States and Sweden April 3, 1783, Article XXI.

Contra as to limitation.

If the citizens or subjects of either party, in danger from tempests, pirates, enemies, or other accidents, shall take refuge, with their vessels or effects, within the harbours or jurisdiction of the other, they shall be received, protected, and treated with humanity and kindness, and shall be permitted to furnish themselves, at reasonable prices, with all refreshments, provisions, and other things necessary for their sustenance, health, and accom[m]odation, and for the repair of their vessels.

Treaty of Amity and Commerce concluded between the United States and Prussia, July 11, 1799, Article XVIII.

**Contra as to limitation.**

Vessels of either party putting into the ports of the other, and having need of provisions or other supplies, they shall be furnished at the market price, \* \* \*

Treaty of Peace and Amity concluded between the United States and Tripoli, June 4, 1805, Article VIII.

**Contra as to limitation.**

If any vessel of either party shall put into a port of the other, and have occasion for provisions or other supplies, they shall be furnished without any interruption or molestation.

Treaty of Peace and Friendship, concluded between the United States and Morocco, September 16, 1836, Article VII.

**Contra as to limitation.**

His Highness the Sultan of Borneo engages to permit the ships of war of the United States of America freely to enter the ports, rivers and creeks situate within his dominions, and to allow such ships to provide themselves, at a fair and moderate price, with such supplies, stores and provisions as they may from time to time stand in need of.

Convention of Amity, Commerce, and Navigation concluded between the United States and Borneo, June 23, 1850, Article VII.

No greater quantity of water, coal, food or other analagous supplies shall be furnished them [belligerent war-ships in neutral ports] than is necessary to enable them to reach their nearest national port.

Institute, 1898, p. 155.

The government of the United States was warranted by the law and practice of nations, in the declarations made in 1793, of the rules of neutrality, which were particularly recognized as necessary to be observed by the belligerent powers, in their intercourse with this country. These rules were \* \* \* the equipment by them of government vessels of war, in matters which, if done to other vessels, would be applicable equally to commerce or war, was lawful.

Kent, vol. 1, pp. 129-130; Instructions to the collectors of the customs, August 4, 1793.

This prohibition [of the use of neutral territory for hostile purposes] is not to be extended to *remote* uses, such as procuring provisions and refreshments, which the law of nations universally tolerates.

Dana's Wheaton, p. 521.

It may be considered the settled practice of nations, intending to be neutral, to prohibit belligerent cruisers from entering their ports, except from stress of weather or other necessity, or for the purpose of obtaining provisions and making repairs requisite for seaworthiness.

Note, 208, Dana's Wheaton.

This restriction, imposed by neutrals upon the vessels of belligerents which come into their ports, is never extended to deny the rights of hospitality in case of immediate danger and want. Armed

cruisers may anchor within a neutral port as a shelter from the attacks of an enemy, to avoid the dangers of a storm, or to supply themselves with water, provisions, and other articles of pressing necessity. Asylum, to this extent, is required by the common laws of humanity, to be afforded to belligerent vessels in neutral ports. But beyond this, there is no right of asylum which the neutral may not withhold equally from all belligerents. It may prevent any free communication with the land, and, as soon as such vessels have supplied their immediate wants, the neutral may compel them to depart from its jurisdiction. Such were the restrictions imposed by the king of the Two Sicilies in the wars of 1740 and 1756, and by Sardinia in the war of 1778, and they are supported by the authority of text-writers.

Halleck, p. 522.

Even during the American Civil War ships of war were only permitted to be furnished with so much coal in English ports as might be sufficient to take them to the nearest port of their own country, and were not allowed to receive a second supply in the same or any other port, without special permission, until after the expiration of three months from the date of receiving such coal. The regulations of the United States in 1870 were similar; no second supply being permitted for three months unless the vessel requesting it had put into a European port in the interval. There can be little doubt that no neutral states would now venture to fall below this measure of care; and there can be as little doubt that their conduct will be as right as it will be prudent.

Hall, pp. 629, 630; Earl Russel to the Lord Commissioners of the Admiralty, January 31, 1862; State Papers, 1871, lxxi, 167.

It was maintained by the United States at Geneva and denied by Great Britain that an undue indulgence was shown to Confederate cruisers in the extent to which they were permitted to obtain supplies of coal in British ports.

Count Schlopis took the view that the question of coal supply could be treated only as connected with the second rule of Article VI. of the treaty of Washington, which declares that a neutral government is bound not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other or for the purpose of the renewal or augmentation of military supplies. He would not say that the mere fact of having allowed a greater amount of coal than was necessary to enable the vessel to reach the nearest port of its own country constituted in itself a ground for an indemnity. But when he saw the *Florida* choose for her field of action the stretch of sea between the Bahama Archipelago and Bermuda to cruise there at ease, and the *Shenandoah* choose Melbourne and Hobsons Bay for the purpose, which was immediately carried out, of going to the Arctic seas to attack whaling vessels, he could not but regard supplies of coal in quantities sufficient for such purposes as infringements of the rule above mentioned.

Mr. Adams expressed the opinion that the safest course in any critical emergency would be to deny altogether a supply of coal to a belligerent vessel, except perhaps in the case of positive distress. Such a policy would, however, he said, be regarded as selfish and

illiberal and would entail upon powers enormous and continual expense for the maintenance of coaling stations. He thought that a supply of coal would involve no responsibility to the neutral when it was made in response to a demand presented in good faith with the single object of satisfying a legitimate purpose openly assigned; but that the contrary would be the case if it was made either tacitly or explicitly with the view to promote or complete the execution of a hostile act. He therefore thought that the only way to determine the responsibility of a neutral in such a case was "by an examination of the evidence to show the *intent* of the grant in any specific case."

Sir Alexander Cockburn contended that the term "base of naval operations" had no relation to the case of a vessel which, while cruising against an enemy's ship, put into a port, and, after obtaining necessary supplies, again pursued her course, but that it referred to the use of a port or of waters as a place from which a fleet or ship might watch an enemy and sally forth to attack him, with the possibility of falling back upon the port or waters in question for fresh supplies or shelter or a renewal of operations.

Mr. Staempfli, in his opinion in the case of the *Sumpter*, held that the permission given to that vessel did not in itself constitute a sufficient basis for charging the British authorities with a failure in the observance of neutral duties, especially as the vessel was, both before and afterwards, permitted to obtain coal in the ports of many other states, and that her last supply before she crossed the Atlantic was not secured in a British port.

The tribunal of arbitration in its award held: "In order to impart to supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character."

In signing the award Viscount d'Itajubá remarked that he was of opinion that every government was "free to furnish to the belligerents more or less" of coal.

It does not appear that in any case Great Britain was held responsible for the acts of a vessel in consequence of supplies of coal.

Moore's Digest, vol. vii, pp. 942, 943; Moore, Int. Arbitrations IV, 4097-4101; Papers relating to the Treaty of Washington, IV, 433, 458, 513, 74, 148, 422, 136, 50, 47.

In every other case but those just considered a belligerent ship of war may need \* \* \* supply, and it has never been claimed that so much \* \* \* supply must be refused her as will enable her to keep the sea.

Westlake, vol. 2, p. 239.

It is understood that the coal supplied under such a rule shall be used in proceeding to the destination which the commander of the ship named as being that of which the distance authorised the supply, \* \* \*

Westlake, vol. 2, p. 240.

We must therefore admit that \* \* \* the limits which as above mentioned have been set by many states to their supply of coal, are not yet a part of international law; but the amount of



recognition which they have received would lend very great weight to any complaint which a belligerent might make on principle of conduct by a neutral power not in conformity with them.

Westlake, vol. 2, p. 242.

When the Russian Baltic fleet was about to undertake a voyage to the sea of Japan, Great Britain took a further step in advance by the instructions of 8 August 1904, which appear to me to have been not only justifiable but a necessary corollary from admitted principles. After reciting that the principle of the previous British regulations "does not extend to enable belligerent ships of war to utilise neutral ports directly for the purpose of hostile operations," it was directed that the rule which "refers to the extent of coal which may be supplied to belligerent ships of war in British ports during the [then] war shall not be understood as having any application to the case of a belligerent fleet proceeding either to the seat of war, or to any position or positions on the line of route with the object of intercepting neutral ships on suspicion of carrying contraband of war; and that such fleets shall not be permitted to make use in any way of any port, roadstead or waters subject to the jurisdiction of H. M. for the purpose of coaling, either directly from the shore or from colliers accompanying such fleet, whether vessels of such fleet present themselves to such port or roadstead or within the said waters at the same time or successively; and that the same practice shall be pursued with reference to single belligerent ships of war proceeding for the purpose of belligerent operations as above defined; provided that this is not to be applied to the case of vessels putting in on account of actual distress at sea." France stands at the other extreme of the scale of advance in the definition of neutral duties, not only not following England in treating the voyage to a scene of action as a special case to which all assistance in coal ought to be denied, \* \* \*

Westlake, vol. 2, pp. 241, 242.

We must now deal with the neutral's duty *to prevent belligerent vessels from taking on board in its ports and roadsteads with undue frequency and in undue amount such supplies as International Law allows.* \* \* \* Few questions have arisen about provisions. Both the British and French neutrality regulations of 1898 and 1904 allowed belligerent vessels to obtain supplies of what was necessary "for the subsistence of the crews." The Hague Conference of 1907 went further and limited the amount that might be taken on any occasion to what was sufficient "to bring their supplies up to the peace standard." The local neutral authorities must be the judges of what this test allows. It would in any case be a considerable quantity. Moreover, no limit was placed on the frequency with which replenishment might be permitted. On the other hand, the neutral retains a right to refuse.

Lawrence, p. 642-643.

With regard to fuel, the first thing to note is that the Convention on state neutrality in warfare at sea speaks as if it were coal and nothing else. But many navies are now using oil as well, and there can be no doubt that the provisions of the Convention will apply

to it. Questions connected with fuel did not arise till steam superseded sails as the ordinary means of propulsion in the middle of the nineteenth century. \* \* \* But the rules adopted for the regulation of the amount of fuel that may be taken in at any one time by a belligerent war-ship in a neutral port are distinctly retrogressive, as compared with what was best in previous practice. Great Britain had in 1862 laid down for the first time that the maximum amount of coal she would allow on any single occasion to a belligerent war-ship was enough to enable her to reach the nearest port of her own country, and in 1904 at the beginning of the Russo-Japanese War she added as an alternative "some nearer named neutral destination." On the same occasion Egypt, doubtless at British instigation, went further still, and required the belligerent commander to sign a declaration setting forth the amount of coal he had on board, and promising that, if supplied with more, he would proceed direct to a port named in the declaration and previously agreed on by him and the Egyptian authorities. In return he was to receive coal sufficient, in conjunction with what he had already, to take him to the port named. It was afterwards stated that if the promise was broken and the coal used for cruising purposes, no more would be supplied to that particular vessel in any circumstances. Further, when it was decided to send the Russian Baltic Fleet on its adventurous voyage to the Far East, the expectation that it would be permitted to coal at various neutral ports on its outward voyage was disappointed as far as Great Britain was concerned by a refusal of supply of any kind to a belligerent fleet or single belligerent war-ships "proceeding either to the seat of war, or to a position or positions along the line of route, with the object of intercepting neutral vessels on suspicion of carrying contraband of war." Holland was the only power to issue a similar prohibition; but many others had adopted previously the rule of measuring the amount of the supply by what the vessel required in order to reach the nearest port of its own country. At the Second Hague Conference France, Russia, and Germany contended for the amount usually obtained in time of peace. In the end what we may call the British rule was adopted, with the addition that belligerent war-ships might "fill up their bunkers built to carry fuel, in neutral countries which have adopted this method of determining the amount of fuel to be supplied." Thus there will in future be two rules instead of several. Great Britain and Japan made reservations against the article which embodied them, holding strongly to the view that the second alternative was much too lax.

Lawrence, pp. 643-645.

#### **Contra, to some extent.**

A neutral must prevent belligerent men-of-war admitted to his ports or maritime belt from taking in such a quantity of provisions and coal as would enable them to continue their naval operations, for otherwise he would make it possible for them to cruise on the Open Sea near his maritime belt for the purpose of attacking enemy vessels.

There is, however, no unanimity of the Powers concerning the quantity of provisions and coal which belligerent men-of-war may be allowed to take in. \* \* \*

Great Britain upholds her rule that belligerent warships shall not be allowed to take in more provisions and fuel in neutral ports than is necessary to bring them safely to the nearest port of their own country.

While, therefore, the matter is not settled, it is agreed that it makes no difference whether the man-of-war concerned intends to buy provisions and coal on land or to take them in from transport vessels which accompany or meet her in neutral waters.

Oppenheim, vol. 2, pp. 401-403.

No ship of war or privateer of either belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without sail power, to the nearest European port of her own country; or in case the vessel is rigged to go under sail, and may be also propelled by steam power, then with half the quantity of coal which she would be entitled to receive if dependent upon steam alone; \* \* \*

Proclamation of President Grant, October 8, 1870, For. Rel. 1870, 48. See also proclamation of President Roosevelt, February 11, 1904.

During the Franco-German war the Peruvian Government issued, October 31, 1870, a decree limiting the amount of coal that might be obtained by belligerent ships to a quantity sufficient to take them to their nearest home or territorial port, for the obtaining of which supply they were to be allowed to remain in port only so long as was necessary; and they were not allowed to renew their supply till four months had elapsed from the date of their last departure from Peruvian waters.

Moore's Digest, vol. vii, p. 944; Mr. Elmore, Peruvian minister of foreign affairs, to Mr. Dudley, American minister, July 23, 1898, enclosed with Mr. Dudley to Mr. Day, Secretary of State, July 21, 1898, MSS. Dept. of State.

A number of the neutrality proclamations issued by foreign powers during the war between the United States and Spain contained a clause limiting the supply of coal which a belligerent vessel might obtain to a quantity sufficient to take such vessel to the nearest port of its own country, or, in other words, to its nearest national port. In the decree of the Netherlands, the provision read that "the store of coal shall only be supplemented sufficiently to allow the ship or vessel to reach the nearest port of the country to which it belongs, or that of one of its allies in the war." When the Spanish fleet, which was afterwards destroyed at Santiago, arrived off Curaçao on the 14th of May, 1898, the commander sought from the Dutch colonial authorities permission to await there 5,000 tons of coal which had been sent thither. This request was denied, as well as a request for permission to ship the coal whenever it should arrive. A request that each vessel be allowed to take 700 tons was likewise refused. Finally, permission was asked and granted for two of the vessels, the *Maria Teresa* and the *Viçcaya*, to enter the harbor and each to take 200 tons, the rest of the ships meanwhile to remain at

anchor in the roads. The 400 tons thus obtained were said to be of "very poor quality."

Moore's Digest, vol. vii, p. 945; Mr. Newell, minister at The Hague, to the Secretary of State, May 20, 1898; Mr. Moore, Assistant Secretary of State to the Secretary of the Navy, June 2, 1898; Mr. Smith, Consul at Curagao to the Secretary of State, May 16 and May 18, 1898.

This shelter [of United States war vessels in a neutral port], which is allowed by comity of nations, may be availed of for the purpose of evading an enemy, from stress of weather, or to obtain supplies or repairs that the vessel needs to enable her to continue her voyage in safety and to reach the nearest port of her own country.

U. S. Naval War Code, 1900, Article 17.

Article 19, Hague Convention XIII, 1907, is substantially identical with section 139, Austro-Hungarian Manual, 1913.

When, in the latter part of May, 1898, it was rumored that the Spanish armored squadron had sailed or was about to sail to the United States and might stop at the Azores for coal, the minister of the United States at Lisbon was instructed to protest against its coaling at those islands, on the ground that, as they lay entirely outside the route from Spain to the Spanish West Indies, such an act would convert the Portuguese territory into a base of hostile operations against the United States.

Moore's Digest, vol. vii, p. 945; Mr. Day, Secretary of State, to Mr. Townsend, minister to Portugal, May 20, 1898.

June 29, 1898, when it was supposed that the Spanish armored fleet would proceed to the Philippines by way of the Suez Canal, Mr. Hay, the United States ambassador in London, was instructed to inform the British Government of a report that the Spanish fleet intended to coal from British colliers at the British island of Perim.

Mr. Hay replied that the British Government had cabled to the resident at Aden and the assistant resident at Perim, concerning the British vessel *Imaum*, whose presence had given rise to the report, and that it was ascertained that she was then discharging 5,000 tons of coal consigned to the Perim Coal Company, and that when this work was finished she would proceed to Karachi. He stated that every precaution had been taken to prevent a violation of neutrality.

Moore's Digest, vol. vii, p. 946; For. Rel. 1898, 983-984.

On June 29, 1898, Mr. Hay, American Ambassador to England telegraphed to the Secretary of State concerning a Spanish vessel; that "British Government concludes Camara can not remain at Port Said more than twenty-four hours, except in case of necessity, and can not coal there if he has enough coal to take him back to Cadiz, which appears to be the case."

Moore's Digest, vol. vii, p. 946; For. Rel. 1898, 983.

Before the outbreak of hostilities, [between the United States and Spain in 1898] the Pacific Mail Steamship Company was permitted, under its agreement with the Mexican Government, to furnish supplies of coal to United States men-of-war at Acapulco. During the

war, the Mexican Government placed limitations on the supply of coal to belligerent vessels in its ports, and made no exception as to United States vessels at Acapulco. The Department of State abstained from addressing any representation to Mexico on the subject, on the ground that as it had "on numerous recent occasions asked of Mexico the strict execution of its neutral duties," it was "not disposed, upon the strength of an agreement between the Pacific Mail Steamship Company and the Mexican Government, made before the war, to insist that public ships of the United States may now be allowed to take coal without limit in a Mexican port."

Moore's Digest, vol. vii, p. 946; Mr. Day, Secretary of State, to Secretary of Navy, August 5, 1898.

To an inquiry of the Government of the Netherlands as to whether the United States understood that the Japanese declaration that coal was contraband of war entailed any restrictions of the rule that coal might be supplied to a belligerent man-of-war in neutral waters sufficient to enable it to reach the nearest home port, the Department of State replied in the negative, saying that the effect of the Japanese proclamation was understood to be merely to serve notice that where Japan found coal being carried to her enemy she would seize it, just as in the case of other articles treated as contraband.

Moore's Digest, vol. vii, p. 949; For. Rel. 1904, 523.

**FUEL NOT ALLOWED TO BELLIGERENT WAR-SHIP IN NEUTRAL PORT IF SHIP HAS RECEIVED FUEL IN PORT OF SAME COUNTRY WITHIN THREE MONTHS.**

**Belligerent war-ships which have shipped fuel in a port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power.—*Hague Convention XIII, 1907, Article 20.***

Even during the American Civil War ships of war were only permitted to be furnished with so much coal in English ports as might be sufficient to take them to the nearest port of their own country, and were not allowed to receive a second supply in the same or any other port, without special permission, until after the expiration of three months from the date of receiving such coal. The regulations of the United States in 1870 were similar; no second supply being permitted for three months unless the vessel requesting it had put into a European port in the interval. There can be little doubt that no neutral states would now venture to fall below this measure of care; and there can be as little doubt that their conduct will be as right as it will be prudent.

Hall, pp. 629, 630; Earl Russel to the Lord Commissioners of the Admiralty, January 31, 1862; State Papers, 1871, lxxi., 167.

\* \* \* the three months' interval between supplies of coal  
\* \* \* has been adopted by the Netherlands, Denmark, Belgium,  
Japan and China besides Great Britain. \* \* \*

Westlake, vol. 2, p. 241.

We must therefore admit that \* \* \* the limits which as above mentioned have been set by many states to their supply of coal, are not yet a part of international law; but the amount of recognition which they have received would lend very great weight to any complaint which a belligerent might make on principle of conduct by a neutral power not in conformity with them.

Westlake, vol. 2, p. 242.

The British neutrality regulations of 1862 declared that at least three months must elapse between any two supplies of coal to the same belligerent vessel in any British port, whether the same as on the previous occasion or a different one. Many powers adopted this rule, but France and several others declined to limit their action by it or any other hard and fast line, while they admitted a duty to grant nothing more than what was necessary for the proper navigation of the vessel. At the second Hague Conference the powers were able to agree on the British rule, with the exception of Germany, who reserved the article which embodied it. This represented a general advance.

Lawrence, p. 643.

\* \* \* and no coal shall again be supplied to any such ship of war or privateer [which has coaled in the United States] in the same or any other port, harbor, roadstead, or waters of the United States, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship of war or privateer shall, since last thus supplied, have entered a European port of the Government to which she belongs.

Proclamation of President Grant, October 8, 1870, For. Rel. 1870, 48. See also proclamation of President Roosevelt, February 11, 1904.

Article 20, Hague Convention XIII, 1907, is substantially identical with section 140, Austro-Hungarian Manual, 1913.

BRINGING AND TEMPORARY STAY OF PRIZES IN NEUTRAL PORT.

A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in **Article XXI**.—*Hague Convention XIII, 1907, Articles 21 and 22.*

**Contra.**

The ships of war of His Swedish Majesty and those of the United States, and also those which their subjects shall have armed for war, may with all freedom conduct the prizes which they shall have made from their enemies into the ports which are open in time of war to other friendly nations; and the said prizes upon entering the said ports shall not be subject to arrest or seizure, nor shall the officers of the places take cognizance of the validity of the said prizes, which may depart and be conducted freely and with all liberty to the places pointed out in their commissions, which the captains of the said vessels shall be obliged to shew.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1873, Article XIX.

**Contra.**

The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to shew.

Treaty of Amity and Commerce concluded between the United States and Prussia, July 11, 1799, Article XIX.

The vessel seized may not be taken to the port of a neutral Power except on account of some peril of the sea, or when the war vessel may be pursued by a superior enemy force.

When, on account of a peril of the sea, the war vessel has taken refuge with the vessel seized in a neutral port, they must quit the port



as soon as possible, after the tempest has passed. The neutral State has the right and the duty to inspect the war vessel and the vessel seized during their stay in the port.

When the war vessel has taken refuge with the vessel seized in a neutral port, because it is pursued by a superior enemy force, the prize must be released.

Institute, 1882, pp. 56, 57.

**Neutral Government restores property of its own subjects illegally seized.**

In the case of prizes brought within a neutral port, the sovereign exercises jurisdiction so far as to restore the property of its own subjects, illegally captured; and this is done, says Valin, by way of compensation for the asylum granted to the captor and his prize.

Kent, vol. 1, p. 129.

**Contra.**

Though a belligerent vessel may not enter within neutral jurisdiction for hostile purposes, she may, consistently with a state of neutrality, until prohibited by the neutral power, bring her prize into a neutral port, and sell it. The neutral power is, however, at liberty to refuse this privilege, provided the refusal be made, as the privilege ought to be granted, to both parties, or to neither.

Kent, vol. 1, p. 132.

**Contra.**

An opinion is expressed by some text-writers, that belligerent cruisers, not only are entitled to seek an asylum and hospitality in neutral ports, but have a right to bring in and sell their prizes within those ports. But there seems to be nothing in the established principles of public law which can prevent the neutral State from withholding the exercise of this privilege impartially from all the belligerent powers; \* \* \* The usage of nations, as testified in their marine ordinances, sufficiently shows that this is a rightful exercise of the sovereign authority which every State possesses, to regulate the police of its own seaports, and to preserve the public peace within its own territory. But the absence of a positive prohibition implies a permission to enter the neutral ports for these purposes.

Dana's Wheaton, pp. 531, 532.

**Contra.**

But while the neutral state may, by proclamation or otherwise, prohibit belligerent vessels with prizes or prisoners of war from entering its ports, the absence of any such prohibition implies the right to enter for the purposes indicated, and any vessel so entering neutral waters, retains her right of ex-territoriality, both with respect to her prisoners of war and her prizes. This question was raised in the port of San Francisco, California, in the case of the Russian vessel, *The Sitka*, a prize of the British navy, during the Crimean war.

Halleck, p. 523; Cushing, Opin. U. S. Attys. Gen., vol. 7, p. 123.

\* \* \* If a neutral consents, it [the prize] may be taken into a convenient port of that description. Such consent the neutral may give or withhold, as he judges best [but it is not now commonly

permitted], unless some urgent cause, as a storm, or the vessel's condition, should render temporary sojourn there necessary. It will be the captor's right, if the neutral opens his ports, to carry there prizes taken from the neutral's own subjects as well as those belonging to any other nationality.

Woolsey, p. 244.

But the practice with respect to property taken at sea has till lately been anomalous. The right of the captor to that which unquestionably belongs to his enemy is no doubt complete as between him and his enemy so soon as seizure has been effected; but as between him and a neutral state, as has been already seen, further evidence of definitive appropriation is required, and his right to the property of a neutral trader seized, for example, as being contraband goods or for breach of blockade, is only complete after judgment is given by a prize court. If therefore the belligerent carries his prize into neutral waters, without deposit in a safe place or possession during twenty-four hours in the case of hostile property, or without protection from the judgment of a prize court in the case of neutral property, he brings there property which does not yet belong to him; in other words, he continues the act of war through which it has come into his power. Indirectly also he is militarily strengthened by his use of the neutral territory; he deposits an encumbrance, and by recovering the prize crew becomes free to act with his whole force. Nevertheless, although the neutral may permit or forbid the entry of prizes as he thinks best, the belligerent is held, until express prohibition, to have the privilege \* \* \* of placing his prizes within the security of a neutral harbour \* \* \*. But it is now usual for the neutral state to restrain belligerents from bringing their prizes into its harbours, except in cases of danger or of want of provisions, and then for as short a time as the circumstances of the case will allow; and it is impossible not to feel an ardent wish that a practice at once wholesome and consistent with principle may speedily be transformed into a duty.

Hall, 642, 643.

A prize sailing under the war flag of her captors stands in principle, for the purpose of her reception into a neutral port, on the same footing as if she had originally belonged to her captors. But there is always the danger of a conflict on board her between her own crew and the prize crew, and, if she is accompanied by a ship of war, of a conflict between the two ships; and this furnishes a sufficient reason for a special objection being taken by neutrals to the reception of prizes in their ports. Indeed, even if the captors are so superior that no such danger practically exists, their retention of the prize is a continuous exercise of force over the captured crew, and no exercise of force between belligerents can in theory be permitted in neutral waters.

Westlake, vol. 2, pp. 242, 243.

It is possible that this regulation [by France in 1650 and 1681] of 24 hours' stay for prizes suggested the similar regulations in different countries for belligerent ships of war generally, but by

many powers prizes are now treated as exceptions and ships of war are prohibited from taking them at all into their ports when neutral except in case of distress. Notably this is the case in Great Britain, Italy, Belgium, the Netherlands, Denmark and Japan. France, Spain and Brazil adhere to the older system of applying the rule of 24 hours' stay to ships with prizes and not to other ships of war, but they prohibit altogether the disposal of prizes or of articles coming out of them, a prohibition which is implicitly contained in the refusal of entry to the prizes though often expressed in addition to it. Of course all this paragraph refers to prizes which have not been judicially condemned by the proper court or sold by its direction. Once that has been done the vessel is the property of the new owner and is no longer a prize.

Westlake, vol. 2, p. 243.

With regard to the admission of prizes, neutrals practised a scandalous laxity not more than a century ago. Then followed a period of varying restraints imposed by each neutral as it thought fit. In 1862 Great Britain excluded prizes altogether, and since then she has followed the same rule when neutral. But many other maritime countries have not deemed it expedient to go so far; and at the Hague Conference of 1907 great differences of opinion were made manifest. The powers could not agree to surrender their liberty of action by imposing on themselves the British rule. The utmost they were able to do was to lay down that the only reasons which justified a belligerent in bringing a prize into a neutral port were "unseaworthiness, stress of weather, a want of fuel or provisions."

Lawrence, p. 641.

A second case for the exercise of the duty of restoration arises when a prize is brought into a neutral port in an irregular manner, that is to say for other causes than unseaworthiness, stress of weather, want of fuel or provisions, and sequestration pending the decisions of a prize court. The neutral power must not sit down quietly under the disrespect shown by the irregularity. It is bidden "to use the means at its disposal" to release the vessel "with its officers and crew and to intern the prize crew." The release is but a preliminary to the handing over of the ship to the authority of the state from which it was captured; and the duty of effecting it is, therefore, properly described as a duty of restoration.

Lawrence, p. 651.

Neutral Powers may—although most maritime States no longer do it—allow prizes to be brought temporarily into their ports.

Oppenheim, vol. 2, p. 396.

#### Exception.

The question requires attention as to whether a prize whose unseaworthiness is so great that it cannot be repaired, may be allowed to remain in the neutral port and be there sold after the competent Prize Court has condemned it. Since article 21 enacts that an admitted prize must leave the neutral port as soon as the circumstances

which justified its entry are at an end, there is no doubt that it may remain if it can not by repair be made seaworthy. And there ought, consequently, to be no objection to its sale in the neutral port, provided it has previously been condemned by the proper Prize Court.

Oppenheim, vol. 2, p. 396.

It was held by the Attorney General of the United States in 1828 that it is not a breach of neutrality to permit a vessel captured as prize to be repaired in the ports of the United States and put in condition to be taken to a port of the captor for adjudication, but that it would be a breach of neutrality to permit a port to be made a cruising station for a belligerent or a depot for his spoils and prisoners, and that considerations of expediency should lead a neutral sovereign to exercise his undoubted right of prohibiting the sale of a prize in his port.

2 Op. Atty. Gen., 86.

The Attorney General of the United States held in 1855, that a neutral nation might, if it saw fit, wholly admit or wholly exclude from its ports the prizes of belligerent war-vessels.

7 Op. Atty. Gen., 122.

In case of stress of weather, or other extreme necessity, the ship which has made the capture may, with the captured vessel, take refuge in the port of a neutral Power. In regard to the length and conditions of his stay in such a port, the Commander of the ship which has made the capture is bound to obey the regulations made on the subject by the Government of the place.

Russian Regulations, 1895, Article 22.

A prize may be taken into a neutral port only when the neutral power permits the bringing in of prizes. A prize may run into a neutral port always on account of unseaworthiness, heavy weather, or shortage of fuel or stores. In these latter cases she must leave the port again as soon as the cause which justified entering no longer exists.

German Prize Rules, 1909, Article 111.

In case of storm or absolute necessity the vessel which has made the capture may seek refuge, together with the captured vessel, in a port belonging to a neutral nation.

It shall be for the local government to decide as to the length and conditions of the stay.

Turkish Regulations, 1912, ch. 1, art. 5.

A prize can not be taken into a neutral port except for reason of unseaworthiness, stress of weather, lack of fuel or provisions. It should depart as soon as the cause that justified its entrance has ceased to exist.

The captor will get into communication with a consul of France and will arrange with him respecting the subsequent destination of the prize.

If a prize, when in a position to leave neutral waters, delays its departure or does not conform to the order to depart immediately as notified to it by the neutral Power, the latter would be within its strict right to use all the means at its disposal to release the prize with its officers and its crew, and to intern the crew placed on board by the captor.

French Naval Instructions, 1912, sects. 129 and 130.

Articles 21 and 22, Hague Convention XIII, 1907, are substantially identical with sections 141, 142, respectively, Austro-Hungarian Manual, 1913.

On Aug. 28, 1801, President Jefferson wrote to Mr. Gallatin as follows:

"The doctrine as to the admission of prizes, maintained by the Government from the commencement of the war between England, France, etc., to this day has been this: The treaties give a right to armed vessels, *with their prizes*, to go where they please, (consequently into our ports), and that these prizes shall not be detained, seized, nor adjudicated, but that the armed vessel may depart as *speedily as may be*, *with her prize*, to the place of her commission; and we are not to suffer their enemies to sell in our ports the prizes taken by their privateers. Before the British treaty, no stipulation stood in the way of permitting France to sell her prizes here; and we did permit it, but expressly as a favor, not as a right. \* \* \* These stipulations admit the prizes to put into our ports in cases of necessity, or perhaps of convenience, but no right to remain if disagreeable to us; and absolutely not to be sold."

Moore's Digest, vol. vii, pp. 935, 936; 1 Gallatin's Writings, 41, 42.

On May 1, 1828, Mr. Clay, Secretary of State wrote to Mr. Rebello that "Neither belligerent is allowed by the laws of the United States to sell his prizes within their ports. The rights of hospitality are equally offered to both. They could not be denied, in many cases, without a violation of the duties of humanity."

Moore's Digest, vol. vii, p. 937; MS. Notes to Foreign Legations, IV, 16.

In the case of the American steamer *Chesapeake*, which was taken possession of, while on a voyage from New York to Portland, Me., by persons acting in the name of the Confederate States, and which was afterwards recaptured in Nova Scotian waters, where the captors had sought asylum, by a United States ship of war, who took the vessel to Halifax and delivered her to the colonial authorities, the Hon. Alex. Stewart, C. B., of the vice-admiralty court, held that the sovereign whose territorial rights are violated by the subjects or citizens of a friendly state can, if he finds them within his jurisdiction, inflict on them his own penalty in his own mode; that the *Chesapeake*, if a prize at all, was an uncondemned prize; that for a belligerent to bring an uncondemned prize into a neutral port to avoid recapture is such a grave offense against the neutral state that it ipso facto subjects the prize to forfeiture, and that the vessel should be restored to the owners on the payment of costs. Mr.

Seward had contended for the restitution of the vessel unconditionally, by executive authority, without waiting for an adjudication; but, on the rendition of the court's decision, he advised the owners to pay the costs under protest, and accepted the restitution as decreed.

Moore's Digest, vol. vii, p. 937; Mr. Seward, Secretary of State, to Mr. Adams, minister to England, No. 852, February 24, 1864, Dip. Cor. 1864, 1, 196.

Replying to an inquiry of the Peruvian legation as to the course the United States would pursue during the war between Spain and Peru, Mr. Seward said: "This Government will observe the neutrality which is enjoined by its own municipal law and by the law of nations. No armed vessels of either party will be allowed to bring their prizes into the ports of the United States."

Moore's Digest, vol. vii, p. 938; Mr. Seward, Secretary of State, to Señor García, February 26, 1866.

BRINGING OF PRIZES INTO NEUTRAL PORT OR ROADSTEAD, TO AWAIT DECISION OF PRIZE COURT—DISPOSITION OF PRIZE CREWS.

A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty.—*Hague Convention XIII, 1907, Article 23.*

\* \* \* but, as Phillimore justly remarks, it would be pedantically rigid to consider, as a violation of neutrality, the allowing prizes captured by one belligerent to be brought into the neutral port, \* \* \*.

Halleck, p. 515.

**Contra.**

The general practice of nations, dictated perhaps by comity, formerly permitted cruisers to bring their prizes into neutral ports. We have already seen that this is not obligatory on neutrals, and sound policy demands that it be prohibited.

The British Government in our war of secession prohibited, by an order of June 1, 1861, the bringing of prizes by vessels of war and privateers of both parties into the waters of the British kingdom and its colonies. France, by a declaration of June 10, 1861, made the same prohibition, excepting that such vessels with prizes are allowed to remain twenty-four hours in her ports, and to remain, in case of a forced suspension of a cruise (*relâche forcée*), as long as the necessity lasts. Treaties sometimes require this.

Woolsey, p. 274.

Nevertheless, although the neutral may permit or forbid the entry of prizes as he thinks best, the belligerent is held, until express prohibition, to have the privilege not only of placing his prizes within the security of a neutral harbour, but of keeping them there while the suit for their condemnation is being prosecuted in the appropriate court. Most writers think that he is also justified by usage in selling them at the neutral port after condemnation; and, as they then undoubtedly belong to him, it is hard to see on what ground he can be prohibited from dealing with his own.

Hall, pp. 642, 643.

**Contra.**

Phillimore, quoted with acquiescence by Hall, says that "an attentive review of all the cases decided in the courts of England and the North American United States during the last war, 1793-1815, leads to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of the belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular but clearly valid." This, if established in practice, seems to be unsound in principle. To be a proper subject of adjudication a prize must have been brought *infra praesidia*, which is not the case while she lies in a neutral port, in which any forcible control of her ought not to be allowed by the territorial sovereign.

Westlake, vol. 2, p. 244; Phillimore, vol. 3, sec. 379, quoted by Hall, sec. 226.

**Contra.**

To these was afterwards added [by the Second Hague Conference] the safe custody of the prize therein [in the neutral port] while it was awaiting the decision of a prize court sitting in the captor's country, and proceeding to adjudication on the papers and not on the ship herself. It is much to be regretted that any sanction was given to so irregular a course. \* \* \* The only serious argument that can be urged in favor of it is that it tends to remove from belligerents the temptation to sink their prizes at sea. Probably political reasons had more influence on the decision than considerations drawn from the fundamental principles of neutrality. States which possessed few harbors in distant parts of the world were unwilling to give up the right of sending their prizes into the ports of any neutral they could persuade to receive them.

Lawrence, p. 641.

**Contra, to some extent.**

\* \* \* the stipulation of article 23 of Convention XIII is of a very doubtful character. This article enacts that a neutral Power may allow prizes to enter its ports, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. And it is of importance to state the fact that the restriction of article 21 does not apply to prizes brought into a neutral port under the rule of article 23. This rule actually enables a belligerent to safeguard all his prizes against recapture, and a neutral Power which allows belligerent prizes access to its ports under the rule of article 23 would indirectly render assistance to the naval operations of the belligerents concerned. For this reason, Great Britain as well as Japan and Siam entered a reservation against article 23. Be that as it may, those Powers which have accepted article 23 will not, I believe, object to the sale in the neutral port concerned of such sequestered prizes, provided they have previously been condemned by the proper Prize Court.

Oppenheim, vol. 2, pp. 396, 397.

If the Vessel appear not to be in a condition to be sent into a proper Port of Adjudication, the Commander should cause a Survey to be made thereof by the Officers of his Ship the best qualified for the duty.



The Surveying Officers should report to the Commander in writing; and the Report should be signed by them, and entered on the Log of the Ship.

If the Surveying Officers report that the Vessel is not in a condition to be sent into a proper Port of Adjudication, the Commander should, if practicable, take her into the nearest Neutral Port that may be willing to admit her.

The Commander, however, must bear in mind that he can not take the Vessel into a Neutral Port against the will of the Local authorities; and that under no circumstances can proceedings for Adjudication be instituted in a Neutral Country.

Both the Cruiser and, if admitted, her Prize are by the Comity of Nations exempt from the local jurisdiction.

If the Vessel is admitted into a Neutral Port, then, in order that proceedings for Adjudication may be duly instituted, the Commander should forward the witnesses, together with the Vessel's Papers and necessary Affidavits, in charge of one of the Officers of his Ship to the nearest British Prize Court.

Holland, pp. 85 and 86.

Although under the terms of Article 23 of Convention XIII of the Hague, a neutral Power has the right to permit access to its ports and roadsteads to prizes, whether escorted or not, when they are brought there to be left under sequestration while awaiting the decision of a prize tribunal, you will only seek to make use of this authorization if the circumstances force you to, and only after assuring yourself that the said neutral Power will in future permit access to its ports and roadsteads for your prizes within the conditions of the said Article 23.

If the neutral port in which it presents itself is absolutely forbidden to it, or if its presence is tolerated there only for an insufficient time, the captor or the master of a prize defers to the requests addressed to him by the government of the country where he is. He acts then for the best interest of his charge, and reports without delay to the Minister of the Navy the refusal he has met with.

French Naval Instructions, 1912, secs. 132 and 133.

Article 23, Hague Convention XIII, 1907, is substantially identical with section 143, Austro-Hungarian Manual, 1913.

*The "Comet," 5 C. Rob., 285.*—In this case the court upheld the validity of the sale of a French prize, in a Spanish port, after condemnation by the courts of France.

*The "Ostsee," Spinks Prize Cases, 174.*—In this case Russian vessels, captured by the British were left in a Prussian port, because of unseaworthiness, and with the consent of the Prussian Government, and, while lying in such port, were condemned by a British Prize Court.

INTERNMENT, IN NEUTRAL PORT, OF BELLIGERENT WARSHIP, ITS OFFICERS AND CREW.

If, notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained.

The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission.—*Hague Convention XIII, 1907, Article 24.*

Where they [belligerent vessels] enter [a neutral port] on sufferance they must respect the wishes of those who permit their presence.

Lawrence, p. 624.

\* \* \* belligerent men-of-war are expected to comply with all orders which the neutral makes for the purpose of preventing them from making his ports the base of their operations of war \* \* \*. And, if they do not comply voluntarily, they may be made to do so through application of force, for a neutral has the duty to prevent by all means at hand the abuse of the asylum granted.

Oppenheim, vol. 2, p. 419.

\* \* \* when after the battle off Port Arthur in August 1904 the Russian battleship *Cesarewitch*, the cruiser *Novik*, and three destroyers escaped, and took refuge in the German port of Tsing-Tau in Kiao-Chau, the *Novik*, which was uninjured, had to leave the port after a few hours, whereas the other vessels, which were too damaged to leave the port, were disarmed and, together with their crews, detained till the conclusion of peace. And when, at the end of May 1905, after the battle of Tsu Shima, three injured Russian men-of-war, the *Aurora*, *Oleg*, and *Jemchug*, escaped into the harbour of Manila, the United States of America ordered them to be disarmed and, together with their crews, to be detained during the war.

Oppenheim, vol. 2, p. 423.

## Laws of United States.

It shall be lawful for the President, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign vessel to depart the United States in all cases in which, by the laws of nations or the treaties of the United States, she ought not to remain within the United States.

Sec. 5288, Revised Statutes.

October 7, 1905, the Commander of the United States naval forces in the Philippines cabled that Admiral Enquist [Commander of the Russian vessels interned at Manila] had asked permission for Shipbuilder Lohvitzky to return to Russia on parole for urgent and satisfactory personal reasons. Under the conditions then existing, it being assumed that a "shipbuilder" was not an active combatant, permission was granted without obtaining the consent of the Japanese Government.

Moore's Digest, vol. vii., p. 995.

\* \* \* the President [of the United States] on the afternoon of the 15th of September [1904] issued an order directing that the *Lena* [a Russian vessel] be taken into custody by the naval authorities of the United States and disarmed under the following conditions: (1) That the vessel be taken to the Mare Island Navy-Yard and there disarmed by removal of small guns, breechblocks, small arms, ammunition, and ordnance stores, and such other dismantlement as might be prescribed by the commandant of the navy-yard; (2) that the captain of the *Lena* should give a written guarantee that she should not leave San Francisco till peace had been concluded, and that the officers and crew should be paroled not to leave San Francisco till some other understanding as to their disposal might be reached between the United States and both belligerents; (3) that, after disarmament, the vessel might be removed to a private dock for such reasonable repairs as would make her seaworthy and preserve her in good condition during detention, or be so repaired at the navy-yard, should the Russian commander so elect, and that while at the private dock the commandant of the navy-yard should have the custody of the ship, and that the repairs should be overseen by an engineer officer to be detailed by him; (4) that the cost of repairs, of private docking, and of maintenance of the ship, officers, and crew while in custody should be borne by the Russian Government, but the berthing at Mare Island and the custody and surveillance of the vessel by the United States; (5) that the vessel, when repaired, if peace had not then been concluded, should be taken back to Mare Island and there held in custody till the end of the war.

The Russian ambassador expressed the adherence of his Government to these conditions, but asked that the officers and crew of the vessel, except 5 officers and 100 seamen, who were necessary for her care, might be permitted to leave the United States. The Japanese Government, on the other hand, asked that all the officers and crew be detained in the United States till the termination of hostilities. The President decided that it would not be consistent with neutrality to grant the request for the repatriation of any of the officers or

crew of the *Lena*, unless both the belligerents agreed to it. Without such an agreement he regarded the position of the men as being identical in principle with that of a military force entering neutral territory and there necessarily held by the neutral.

Moore's Digest, vol. vii, pp. 999, 1000; For. Rel. 1904, 428-430.

Article 24, Hague Convention XIII, 1907, is substantially identical with section 144, Austro-Hungarian Manual, 1913.

OBLIGATION OF NEUTRAL POWER TO PREVENT VIOLATION, IN ITS PORTS, ROADSTEADS, OR WATERS, OF PROVISIONS OF HAGUE CONVENTION XIII, 1907—EXERCISE OF NEUTRAL RIGHTS UNDER CONVENTION NOT TO BE REGARDED AS UNFRIENDLY ACT.

**A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters.**

**The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the articles relating thereto.—Hague Convention XIII, 1907, Articles 25 and 26.**

The neutral authorities shall see that the provisions of this article [relative to the conduct of belligerent war ships in a neutral port] are respected using force if necessary.

Institute, 1898, p. 155.

It is not only the right of the neutral state to protect the property of the belligerents, when within the neutral jurisdiction, but it is a part of the duty of neutrality to defend such property while under neutral protection, and to punish any and every offense against the rights of neutrality, even, if necessary, by a resort to force. Livy relates that Syphax enforced peace between the Carthaginian and Roman galleys while lying in a neutral port. The Venetians prevented the Greeks from attacking the Turks in the neutral port of Chalcocondylas. The same may be said of the Venetians and Turks at Tunis, of the Pisans and Genoese in Sicily, and numerous other cases mentioned in history. The Dutch East Indian fleet having put into Bergen, in Norway, in 1666, to avoid the English, were attacked by them; but the governor of Bergen fired on the assailants, and the court of Denmark complained to the English government of the violation of its sovereignty.

Halleck, p. 530.

Roughly speaking, the neutral is bound to prevent within its jurisdiction what the belligerent is bound to abstain from doing therein. But though this statement is accurate as far as it goes, it is by no means exhaustive; for neutral governments are, as we shall see, obliged by International Law to exert themselves in order to stop the consummation of certain acts when done by private individuals on their own initiative. And in all cases their action must be strong and resolute, not weak and perfunctory. Various attempts have been made to define or describe the standard of vigilance expected from them. By the Treaty of Washington of 1871 three rules were laid down, whereby Great Britain consented to be judged in the Arbitra-

tion on what were known generically as the Alabama Claims. The first and third of these declared it to be the duty of a neutral state to use "due diligence" in order to prevent various violations of its neutrality. Immediately a controversy arose as to the true meaning of the phrase. Great Britain contended that due diligence "signifies that measure of care which the government is under an obligation to use for a given purpose,"—an explanation which fails conspicuously to explain. The United States that it must be a diligence "commensurate with the emergency or with the magnitude of the results of negligence"—an explanation which imposes a variable standard. The Arbitrators decided that it must be a diligence exercised by neutrals "in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part"—an explanation which destroys impartiality. Much has been written on the subject since the award was given in 1872, but an authoritative standard of due diligence remains to be found. The attempt to find it was abandoned by the Second Hague Conference when it negotiated its Convention concerning the Rights and Duties of Neutral Powers in Maritime War. The eighth article, which reproduces with a few verbal changes the first of the three rules of the Treaty of Washington, alters the words "A neutral government is bound to use diligence" into "A neutral government is bound to use the means at its disposal," and a similar phrase occurs in the twenty-fifth article. Whether the substitute will prove more satisfactory than the original remains to be seen. Let us suppose for a moment that the law of a neutral state is lax in this particular, and confers on its government insufficient means of maintaining neutrality. How would its Minister of Foreign affairs meet the argument of the aggrieved belligerent that a state is bound to arm its executive officers with powers sufficient to enable them to perform the obligations imposed on it by International Law? The zeal and vigilance required in such cases should, we venture to suggest, be the same as that which a well-governed state applies to its own internal affairs.

Lawrence, pp. 633, 634.

#### Laws of the United States.

[The district courts shall take cognizance of all complaints, by whomever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.] In every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot, contrary to the provisions and prohibitions of this Title (R. S., 5281-5291); and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, it shall be lawful for the President, or such other

person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to the execution of the prohibitions and penalties of this Title, and to the restoring of such prizes in the cases in which restoration shall be adjudged; and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace.

Section 5287, Revised Statutes.

Article 25, Hague Convention XIII, 1907, is substantially identical with section 145, Austro-Hungarian Manual, 1913.

LIST OF ARTICLES ABSOLUTELY CONTRABAND—ADDITIONS THERETO, HOW MADE.

The following articles may, without notice,<sup>1</sup> be treated as contraband of war, under the name of absolute contraband:—

- (1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
- (2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.
- (3) Powder and explosives specially prepared for use in war.
- (4) Gun-mountings, limber boxes, limbers, military wag-gons, field forges, and their distinctive component parts.
- (5) Clothing and equipment of a distinctively military character.
- (6) All kinds of harness of a distinctively military character.
- (7) Saddle, draught, and pack animals suitable for use in war.
- (8) Articles of camp equipment, and their distinctive component parts.
- (9) Armour plates.
- (10) Warships; including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.
- (11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

Articles exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified.

Such notification must be addressed to the Governments of other Powers, or to their representatives accredited to the Power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral Powers.—*Declaration of London, Articles 22 and 23.*

This list is that drawn up at the second peace conference by the committee charged with the special study of the question of contraband. It was the result of mutual concessions, and it has not seemed

<sup>1</sup> In view of the difficulty of finding an exact equivalent in English for the expression "de plein droit," it has been decided to translate it by the words "without notice," which represent the meaning attached to it by the draftsman as appears from the General Report (see p. 44).



wise to reopen the discussion on this subject for the purpose either of cutting out or of adding articles..

The words "de plein droit" (without notice) imply that the provision becomes operative by the mere fact of the war, and that no declaration by the belligerents is necessary. Trade is already warned in time of peace.

Report of committee which drafted Declaration of London.

Certain discoveries or inventions might make the list in article 22 insufficient. An addition may be made to it on condition that it concerns articles exclusively used for war. This addition must be notified to the other powers, which will take the necessary measures to inform their subjects of it. In theory the notification may be made in time of peace or of war. The former case will doubtless rarely occur, because a state which made such a notification might be suspected of meditating a war; it would, nevertheless, have the advantage of informing trade beforehand. There was no reason for making it impossible.

The right given to a power to make an addition to the list by a mere declaration has been thought too wide. It should be noticed that this right does not involve the dangers supposed. In the first place, it is understood that the declaration is only operative for the power which makes it, in the sense that the article added will only be contraband for it, as a belligerent; other states may, of course, also make a similar declaration. The addition may only refer to articles exclusively used for war; at present it would be hard to mention any such articles which are not included in the list. The future is left free. If a power claimed to add to the list of absolute contraband articles not exclusively used for war, it might expose itself to diplomatic remonstrances, because it would be disregarding an accepted rule. Besides, there would be an eventual resort to the international prize court. Suppose that the court holds that the article mentioned in the declaration of absolute contraband is wrongly placed there because it is not exclusively used for war, but that it might have been included in a declaration of conditional contraband. Confiscation may then be justified if the capture was made in the conditions laid down for this kind of contraband (arts. 33-35) which differ from those enforced for absolute contraband (art. 30).

It had been suggested that, in the interest of neutral trade, a period should lapse between the notification and its enforcement. But that would be very damaging to the belligerent, whose object is precisely to protect himself, since, during that period, the trade in articles which he thinks dangerous would be free and the effect of his measure a failure. Account has been taken, in another form, of the considerations of equity which have been adduced (see art. 43).

Report of committee which drafted Declaration of London.

*Chapter II—Contraband of war.*—This chapter is one of the most, if not the most, important of the declaration. It deals with a matter which has sometimes given rise to serious disputes between belligerents and neutrals. Therefore regulations to establish exactly the rights and duties of each have often been urgently called for. Peaceful trade may be grateful for the precision with which a sub-

ject of the highest importance to its interests is now for the first time treated.

The notion of contraband of war connotes two elements: It concerns objects of a certain kind and with a certain destination. Cannons, for instance, are carried in a neutral vessel. Are they contraband? That depends; if they are destined for a neutral government, no; if they are destined for an enemy government, yes. The trade in certain articles is by no means generally forbidden during war; it is the trade with the enemy in these articles which is illicit, and against which the belligerent to whose detriment it is carried on may protect himself by the measures allowed by international law.

Articles 22 and 24 enumerate the articles which may be contraband of war, and which are so in fact when they have a certain destination laid down in articles 30 and 33. The traditional distinction between absolute and conditional contraband is maintained. Articles 22 and 30 refer to the former, and articles 24 and 33 to the latter.

Report of committee which drafted Declaration of London.

Under the name of contraband or prohibited goods shall be comprehended arms, great guns, cannon-balls, arquebuses, musquets, mortars, bombs, petards, granadoes, saucisses, pitch-balls, carriages for ordnance, musquet-rests, bandoleers, cannon-powder, matches, saltpetre, sulphur, bullets, pikes, sabres, swords, morions, helmets, cuirasses, halberds, javelins, pistols and their holsters, belts, bayonets, horses with their harness, and all other like kinds of arms and instruments of war for the use of troops.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, Article IX.

All cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpeter, sulphur, cuirasses, pikes, swords, belts, cartouch boxes, saddles and bridles, beyond the quantity necessary for the use of the ship, or beyond that which every man serving on board the vessel, or passenger, ought to have; and in general whatever is comprised under the denomination of arms and military stores, of what description soever, shall be deemed objects of contraband.

Treaty of Amity and Commerce concluded between the United States and Prussia, July 11, 1793, Article XIII.

This liberty of navigation and commerce shall extend to all kinds of merchandise, excepting those only which are distinguished by the name of contraband; and under this name of contraband, or prohibited goods, shall be comprehended—

1st. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, rifles, carbines, pistols, pikes, swords, sabres, lances, spears, halberds, and grenades, bombs, powder, matches, balls and all other things belonging to the use of these arms.

2d. Bucklers, helmets, breast-plates, coats of mail, infantry belts, and clothes made up in the form and for the military use.

3d. Cavalry belts, and horses with their furniture.

4th. And generally all kinds of arms and instruments of iron, steel, brass, and copper, or of any other materials manufactured, prepared and formed expressly to make war by sea or land.

5th. Provisions that are imported into a besieged or blockaded place.

Treaty of Peace, Amity, Navigation and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XVII.

This liberty of navigation and commerce shall extend to all kinds of merchandise, excepting those only which are distinguished by the name of contraband of war, and under this name shall be comprehended:

1st. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fuses, rifles, carbines, pistols, pikes, swords, sabers, lances, spears, halberds and grenades, bombs, powder, matches, balls, and all other things belonging to the use of these arms.

2d. Bucklers, helmets, breastplates, coats of mail, infantry-belts and clothes made up in the form and for a military use.

3d. Cavalry-belts, and horses, with their furniture.

4th. And, generally, all kinds of arms, offensive and defensive, and instruments of iron, steel, brass and copper, or any other materials manufactured, prepared and formed expressly to make war by sea or land.

Treaty of Peace, Friendship, Commerce, and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XVII.

The liberty of navigation and commerce secured to neutrals by the stipulations of this treaty shall extend to all kinds of merchandise, excepting those only which are distinguished by the name of contraband of war. And, in order to remove all causes of doubt and misunderstanding upon this subject, the contracting parties expressly agree and declare that the following articles, and no others, shall be considered as comprehended under this denomination:

1. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fuses, rifles, carbines, pistols, pikes, swords, sabers, lances, spears, halberds, bombs, grenades, powder, matches, balls, and all other things belonging to, and expressly manufactured for, the use of these arms.

2. Infantry belts, implements of war and defensive weapons, clothes cut or made up in a military form and for a military use.

3. Cavalry belts, war saddles and holsters.

4. And generally all kinds of arms and instruments of iron, steel, brass, and copper, or of any other materials manufactured, prepared, and formed expressly to make war by sea or by land.

Treaty of Commerce and Navigation concluded between the United States and Italy, February 26, 1871, Article XV.

The belligerent governments shall determine in advance, in each war, the objects which they will consider contraband.

Institute, 1882, p. 51.

In the term *munitions of war*, shall be included articles which, to be used directly in war, need only to be assembled or combined.

Institute, 1896, p. 129.

The following articles are contraband of war: 1. arms of all kinds; 2. munitions of war and explosives; 3. military *matériel* (articles of

equipment, gun-mountings, uniforms, etc.); 4. vessels fitted out for war; 5. instruments designed exclusively for the immediate manufacture of munitions of war; when these various articles are transported by sea for the account of or addressed to a belligerent.

Institute, 1896, p. 129.

#### Horses and their equipage.

The marine ordinance of Louis XIV. included horses and their equipage, transported for military service, within the list of contraband, because they were necessary to war equipments; and that is, doubtless, the general rule.

Kent, vol. 1, p. 143; Des Prises, art. 11.

#### Ships' timber.

The executive government of this country has frequently conceded that the materials for the building, equipment, and armament of ships of war, as timber and naval stores, were contraband. But it does not seem that ship timber is, *in se*, in all cases, to be considered a contraband article, though destined to an enemy's port. In the case of the Austrian vessel, *Il Volante*, captured by the French privateer, *L'Etoile de Bonaparte*, and which was carrying ship timber to Messina, an enemy's port, it was held, by the Council of Prizes at Paris, in 1807, upon the opinion of the advocate-general, M. Collet Descotils, that the ship timber in that case was not contraband of war, it being ship timber of an ordinary character, and not exclusively applicable to the building of ships of war.

Kent, vol. 1, pp. 143-144; Mr. Randolph's Letter to M. Adet, July 6, 1795; Mr. Pickering's letter to Mr. Pinckney, January 16, 1797; Letter of Messrs. Pinckney, Marchall, and Gerry, to the French Minister, January 27, 1798; Pistoye and Duverdy, i, 409.

It is the *usus bellici* which determined an article to be contraband; and as articles come into use as implements of war which were before innocent, there is truth in the remark, that as the means of war vary and shift from time to time, the law of nations shifts with them; not, indeed, by the change of principles, but by a change in the application of them to new cases, and in order to meet the varying inventions of war.

Kent, vol. 1, p. 147.

The almost unanimous authority of elementary writers, of prize ordinances, and of treaties, agrees to enumerate among these [contraband articles] all warlike instruments, or materials by their own nature fit to be used in war. Beyond these, there is some difficulty in reconciling the conflicting authorities derived from the opinions of public jurists, the fluctuating usage among nations, and the texts of various conventions designed to give to that usage the fixed form of positive law.

Dana's Wheaton, pp. 608, 609.

The position of the subject of contraband cannot be said to have been much changed since the text was written; still, some light has been thrown upon it by the discussions of later writers.

There seems to have been a concurrence of opinion on one point, that certain things are of such a nature as to be conclusively deemed contraband, so that no further inquiry need be made by prize courts. These courts must act summarily, by sharp and clear lines, and often upon absolute presumptions. It is agreed that they must do so as to contraband. The only difference seems to be one of detail, as to what things do or do not come into this category. The test is variously described, and more or less strictly; but it seems to amount to this,—*Is the primary and ordinary use of the article military, when in the enemy's possession in time of war?* No article is exclusively of military use. Fire-arms are used in time of peace for police purposes, for killing game, for private defence, for salutes, for signal-guns; and mortars and shells, for the humane object of communicating with wrecked vessels; and powder is used for blasting rocks to construct buildings of peace and benevolence. The question is,—what is the primary and ordinary use of such things, in time of war, when in the enemy's possession? It is agreed that all forms of fire-arms, swords, powder and ball, come within this category. It is a question of detail, after the test is agreed upon, what other articles come under it.

Dana's Wheaton, Note 226.

The declarations of the French and English governments, at the commencement of the war with Russia, in 1854, except *contraband of war* from the articles to which impunity is accorded, but they contain no new definition of contraband. But the British order, in council of February 18th, 1854, issued in anticipation of the declaration of war, prohibits from being exported or carried coastwise, "all arms, ammunition and gun powder, military and naval stores, and the following articles, being articles which are judged capable of being converted into, or made useful in increasing the quantity of military or naval stores, that is to say, marine engines, screw propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, fire bars, and every article or any other component part of an engine or boiler, or any article whatever, which is, or can, or may become applicable for the manufacture of marine machinery." Although this order, and its subsequent modification, was probably not intended as a fresh declaration of contraband of war, yet it was evident, from the character of the order itself, and from answers given by the ministers in the house of commons, that the parts and elements of steam machinery, and also coals, were to be regarded as articles *ancipitis usus*, not necessarily contraband, but liable to be considered so, if they were to be applied to the military or naval uses of the enemy. A Swedish ordinance, of April 8th, 1854, section fifth, enumerates as contraband of war, all kinds of arms, munitions of war, military stores, saddles, bridles, and other manufactured articles immediately applicable to warlike purposes.

Halleck, pp. 581, 582; Edinburg Review, No. 203, July 1854; Ortolan, Dip. de la Mer, tome 2, ch. 6; Heffter, Droit International, sec. 160.

It is universally admitted, as already remarked, that all instruments and munitions of war are to be deemed contraband, and subject to condemnation. This rule embraces, by its terms, and by fair con-

struction, all ordnance and arms of every description, balls, shells, shot, gunpowder, and articles of military pyrotechny, gun-carriages, ammunition-wagons, belts, scabbards, holsters, all military equipments and military clothing. Any vessel, evidently built for warlike purposes, as gun and mortar boats, and destined to be sold for such use, is clearly liable to confiscation under the same rule. To this list is to be added all articles, manufactured or unmanufactured, which are almost exclusively used for military purposes, as machinery for manufacturing arms, and saltpetre, and sulphur for making gunpowder.

Halleck, pp. 583-584.

It is an established doctrine of the English admiralty, that all manufactured articles that in their natural state are fitted for military use, or for building and equipping ships of war, such as masts, spars, rudders, wheels, tillers, sails, sailcloth, cordage, rigging and anchors, are contraband in their own nature, to the same extent as munitions of war, and that no exception is admitted in their favor, unless created by express provisions of a treaty. Since the introduction of steam, as a motive power, in ships of war, the British prize courts would probably, upon the same principle, condemn as contraband all marine engines, screw-propellers, cylinders, shafts, boilers, boiler plates, tubes, fire-bars, and every component part of a marine engine or boiler, and every article suitable for the manufacture of marine machinery.

Halleck, p. 584.

Grotius placed all commodities under three heads. "There are some objects," he says, "which are of use in war alone, as arms; there are others which are useless in war, and which serve only for purposes of luxury; and there are others which can be employed both in war and in peace, as money, provisions, ships, and articles of naval equipment. Of the first kind it is true, as Amalasuintha said to Justinian, that he is on the side of the enemy who supplies him with the necessities of war. The second class of objects gives rise to no dispute. With regard to the third kind, the state of the war must be considered. If seizure is necessary for defence, the necessity confers a right of arresting the goods, under the condition however that they shall be restored unless some sufficient reason interferes." The division which was made by Grotius still remains the natural framework of the subject. \* \* \*

The practice of different nations has been generally determined by their maritime strength, and by the degree of convenience which they have found in multiplying articles, the free importation of which they have wished to secure for themselves, or to deny to their enemy. Frequently, they have endeavored by their treaties to secure immunity for their own commerce when neutral, and have extended the list of prohibited objects by proclamation so soon as they became belligerent.

Hall, pp. 665, 666.

The privilege has never been denied to a belligerent of intercepting the access to his enemy of such commodities as are capable of being immediately used in the prosecution of hostilities against himself.

But at no time has opinion been unanimous as to what articles ought to be ranked as being of this nature, and no distinct and binding usage has hitherto been formed, except with regard to a very restricted class.

\* \* \* \* \*

Objects which are of use in war alone are easy to enumerate and to define. They consist of arms and ammunition, the lists of which, as contained in treaties, remain essentially the same as in the eighteenth century. The only variations which time has introduced have followed the changes in the form and names of weapons. As to this head therefore there is no difference of opinion; but beyond it certainty is at once lost.

Hall, pp. 665, 666.

#### French practice.

In 1681, the *Ordonnance de la Marine*, which has been generally looked upon as fixing French law upon the matter, laid down that "arms, powder, bullets, and other munitions of war, with horses and their harness, in course of transport for the service of our enemies, shall be confiscated."

The eighteenth century was opened with the inclusion of naval stores by France in 1704, but on the whole French practice was sufficiently consistent. Its treaties invariably stated munitions of war and saltpetre to be contraband, and with one exception they included horses; but they all expressly excluded provisions; except in one case they refused to admit into the list money and metals; in two cases materials of naval construction are unmentioned, and in only one treaty, made in 1742, are they specifically included. The treaties made with the United States in 1778, with England in 1786, and with Russia in 1787, also excluded ships. The practice of Spain has been identical in principle with that of France.

\* \* \* \* \*

On the outbreak of war between France and England in 1793, the Convention decreed that neutral vessels laden with provisions destined to an enemy's port should be brought in for preemption of the cargo, although treaties were then existent between France and the Hanse Towns, Hamburg, the United States, Mecklenburg, and Russia, in which it was stipulated that provisions should not be contraband of war. But the Prize Courts seem to have acted upon the rules of the Ordinance of 1681; and of the few treaties which have been concluded by France during the present century, only one varies from the form which is usual in her conventions.

Hall, pp. 668 and 674; Dumont, vi, ii, 103 and 64; Valin, *Ord. de la Marine*, ii, 264; Phillimore, iii, sec. cxlv; *Il Volante, Pistoye et Durverdy*, i, 409.

#### Russian practice.

It was natural, however, that the secondary maritime powers should in time accommodate their theories to their interests. They were not sure of being able as belligerents to enforce a stringent rule; they were certain as neutrals to gain by its relaxation. Accordingly, in 1780 Russia issued a Declaration of neutral rights, among the provisions of which was one limiting articles of contraband to munitions

of war and sulphur. Sweden and Denmark immediately adhered to the Declaration of Russia, and with the latter power formed the league known as the First Armed Neutrality. Spain, France, Holland, the United States, Prussia, and Austria, acceded to the alliance in the course of the following year. Finally it was joined in 1782 by Portugal, and in 1783 by the Two Sicilies.

It is usual for foreign publicists to treat the formation of the Armed Neutrality as a generous effort to bridle the aggressions of England, and as investing the principles expressed in the Russian Declaration with the authority of such doctrines as are accepted by the body of civilised nations. It is unnecessary to enter into the motives which actuated the Russian government; but it is impossible to admit that the doctrines which it put forward received any higher sanction at the time than such as could be imparted by an agreement between the Baltic Powers. The accession of France, Spain, Holland, and the United States was an act of hostility directed against England, with which they were then at war, and was valueless as indicating their settled policy, and still more valueless as manifesting their views of existing international right. It was the seizure by Spain of two Russian vessels laden with wheat which was the accidental cause of the original Declaration, and within a few months of adhering to the league France had imposed a treaty upon Mecklenburg, and Spain had issued an Ordinance, both of which were in direct contradiction to parts of the Declaration. The value of Russian and Austrian opinion in then position of those countries as maritime powers is absolutely trivial. Whatever authority the principles of the Armed Neutrality possess, they have since acquired by inspiring to a certain but varying extent the policy of France, the United States, Russia, and the minor powers.

Hall, pp. 672-674.

#### **United States practice.**

In the present century a treaty of the United States with England retains naval stores and saltpetre, and is silent upon other points; another with Sweden includes sulphur and saltpetre, excluding naval stores; a third with France follows the terms affected by the latter power; and fourteen treaties, all, with one exception, contracted with American States, mention munitions of war and horses; and treat provisions, money, metals, ships, and articles of naval construction as innocent. Those with Mexico and San Salvador contain the special stipulation that provisions destined to a besieged port are to be excepted from the usual immunity. It would seem, on the whole, that the United States have always recognised the English doctrine of contraband to be more in consonance with existing usage than that of France, but that they have wished in certain cases to limit the application of the rule by express convention.

Hall, pp. 675, 676.

#### **British practice.**

Besides the treaties already mentioned, Great Britain has only twice entered into special agreements with reference to contraband since the beginning of the present century; and as almost all her previous



contracts have been dissolved by war, her practice is mainly to be sought in the decisions of her Prize Courts. These persistently carried out, through the whole of the Revolutionary and Napoleonic wars, the traditionary principles upon which England had always before acted, of classing as contraband not merely articles susceptible only of warlike employment, but also a large number of those *ancipitis usus*.

Hall, pp. 676, 677.

#### Continental opinion.

Among continental jurists two currents of opinion are visible. Some writers strive to reduce the list of contraband within the narrowest dimensions, notwithstanding the increased variety of material which is applicable more or less immediately to the purposes of warfare. Their works show a love for theoretic neatness, and some detachment from the practical aspects of the subject. Others, recognising the difficulty of making a fixed and restricted list of contraband, and the improbability that assent to any such list would be generally given, or if given would be adhered to in circumstances of temptation, retain the principle of variability, while in most cases giving evidence of a healthy wish to confine its effects within very moderate limits. That the weight of opinion is in favour of the latter view there can be no question; and it will be seen that the more important states have given no reason to suppose that they are willing to tie their hands by hard and fast rules, whatever restriction in certain particulars it is possible that some of them, as for example Russia, may be anxious to place in their own interests upon the list of contraband.

Hall, pp. 677-680.

#### Horses.

Horses, saltpetre and sulphur, may be placed first as subjects of the widest usage. It has always been the practice of England and France to regard horses as contraband; in a very large number of treaties they are expressly included; in none are they excluded except in a few contracted by Russia, and in those between the United States and other American countries, the latter however confining the prohibition to cavalry mounts. M. Bluntschli treats this limitation as a matter of international rule, without explaining in what way horses used for artillery or transport are less noxious than those employed in the cavalry, or how it can be determined for which use they are intended. Under the mere light of common sense the possibility of looking upon horses as contraband seems hardly open to argument. They may no doubt be important during war-time for agricultural purposes, as powder may be used for fireworks; but the presumption is certainly not in this direction. To place an army on a war-footing often exhausts the whole horse reserve of the country; the subsequent losses must be supplied from abroad, and more necessarily so as the magnitude of armies increases. Almost every imported horse is probably bought on account of the government; if in rare instances it is not, some other horse is at least set free for belligerent use.

Hall, pp. 682, 683; Bluntschli, sec. 805.

**Horses.**

The military administration in Germany is apparently less inclined than the jurists of that country to regard the acquisition of horses by an enemy as unimportant. In 1870 Count Bismarck complained to Lord A. Loftus that the "export of horses from England under existing circumstances provided the enemy of Prussia with the means of carrying on a war with a power in amity with Great Britain." State Papers, No. 3, 1870, Franco-Prussian War. Horses are included in an Austrian ordinance of 1864, which in other respects limits contraband to munitions, &c., saltpetre, and sulphur.

Hall, p. 683, note.

**Saltpetre and sulphur.**

The amount of authority and of reason in favour of including saltpetre and sulphur is approximately the same as that which governs the case of horses. But there are no treaties in which these commodities are expressly excluded.

They are not now of so much importance as formerly, but the principle upon which saltpetre and sulphur are included of course covers also materials necessary to the manufacture of the various kinds of explosives which have been invented of late, and which are yearly increasing in number.

Hall, pp. 683, 684.

**Differing practice of nations.**

Materials of naval construction, e. g. ship timber, masts, spars of a certain size in a manufactured state, marine engines or their component parts, sailcloth, cordage, copper in sheets, hemp, tar, &c., have been deemed contraband by less general consent. English usage bars all such objects from reaching the enemy, but does not treat them as being all equally harmful. Manufactured articles are looked upon with more suspicion than raw material; and where commodities are the staple produce of the exporting country and owned by persons belonging to it, the penalty of confiscation is relaxed, and they are subjected only to pre-emption. The American rule on the subject is identical with that of England, and the Confederates also acted upon it during the Civil War. In the course of a dispute with Spain in 1797, the details of which are unimportant, the government of the United States laid down that 'ship timber and naval stores are by the law of nations contraband of war,' and the courts give expression to a like view. The custom of France has now become fixed in an opposite sense. The policy of the Northern States, which have always exported their timber and tar, can only be confirmed by the modern necessity of importing machinery. The views of the South American world are probably indicated by its treaties with the United States, the tenor of which is thoroughly in consonance with the interests of the southern nations. Writers are divided into two classes, the members of which correspond to those whose diverse opinions as to horses have already been cited. In practice, therefore, the maritime authority of England and America is opposed by that of France, supported by a crowd of nations, the future nature or importance of the naval action of many

of which cannot at present be foretold. Upon reasonable grounds it would appear that it must always be a matter of the highest and most immediate belligerent importance for a non-manufacturing state to import machinery in safety, and for a country poor in forests or in iron to be able to introduce ship timber and armour plates. It need hardly be pointed out that while the principle remains unaltered, under which materials apt for the construction of warships used reasonably to be confiscated, not only will the lists of noxious articles be found in the next maritime war to need large revision by the addition of new objects and the excision of others which have fallen out of use, but the relative importance of those which are continued from the old list will be found to have greatly changed.

Hall, pp. 684, 685; Hansard, 3d series, vol. cxxxiv, 916; Ortolan, *Dip. de la Mer*, vol. ii, Appendix xxi; Pistoye et Duverdy, i, 445; *Il Volante*, ib., 409; *La Minerve*, ib., 410; Neut. Laws Commissioners Rep., Appendix iv.

#### **Military clothing.**

\* \* \* in general, clothing and its materials, are of like character with provisions, and in principle may become contraband under similar conditions; \* \* \* and though uniforms, soldiers' great coats, &c., may offer some difficulty, since their destination and their use for warlike purposes is obvious, they are not, on the other hand, of such necessity in ordinary circumstances that the presence or absence of a particular consignment can be expected to affect in any way the issue of hostilities.

Hall, p. 690.

#### **Proceedings at Hague Conference, 1907.**

In these circumstances it is not surprising that the fourth committee of the Hague Conference of 1907 was unable to frame any scheme relating to contraband of war which should unite sufficient suffrages to justify its being brought before a full sitting of the Conference, but it is worth while to register the most important views which received expression in the committee. First of these, as most radical, must be placed the following British declaration made at the opening of the Conference.

In order to diminish the difficulties encountered by neutral commerce in time of war, the government of H. B. M. is prepared to abandon the principle of contraband in case of war between the powers which may sign a convention to that effect. The right of visit would be exercised only in order to ascertain the neutral character of the merchantman.

In support of this declaration it was argued that profound doctrinal and practical differences exist as to contraband, especially as to the treatment of things which are not absolute contraband in the strictest sense, and that a codification of the law was hopeless—that the progress of science has increased the number of things which in certain circumstances are of use in war though not absolute contraband in the strictest sense—that the complaints of neutrals on account of interference with the trade in things of that class have consequently increased—that the complexity of the cargoes carried by modern merchantmen of large size makes the search in them for contraband goods difficult and vexatious—that further difficulties would arise if a ship accused of carrying contraband was al-

lowed to proceed on her voyage, the alleged contraband being trans-shipped or destroyed—that the destination of contraband to the enemy is often difficult of proof, and that under the doctrine of continuous voyage a belligerent might almost entirely interrupt neutral commerce—that for all these reasons the principle of contraband is the source of great damage to trade in non-contraband goods, and that neutrals demand indemnities so large that prize courts refuse them—that during the Russo-Japanese war only the tact of the parties concerned prevented serious international results arising from the principle of contraband—that belligerents derive no compensating benefit from that principle—and that to abandon it would be a work of peace and justice. To these reasons we may add that the practical difficulty which during the South African war was found in enforcing the right of search at a distance from the suspected ship's destination had much diminished the value of the principle of contraband to belligerents. The extent to which these considerations prevailed is shown by the vote taken in committee on a resolution to the effect of the British declaration, which was affirmed by the delegations of the following 25 states: Argentina, Austria-Hungary, Belgium, Brazil, Bulgaria, Chile, China, Cuba, Denmark, Great Britain, Greece, Italy, Mexico, Netherlands, Norway, Paraguay, Peru, Persia, Portugal, Salvador, San Domingo, Servia, Siam, Sweden and Switzerland. Negative votes were given by the delegations of four great powers and one small state: France, Germany, Montenegro, Russia and the United States of America. And the delegations of five states abstained from voting: Spain, Japan, Panama, Rumania and Turkey. But Spain afterwards adhered to the resolution.

Westlake, vol. 2, pp. 287–289; *Courrier de la Conférence*, no. 89, 26 September, 1907.

#### **Proceedings at Hague Conference, 1907.**

The proposal [at the Hague Conference in 1907] next most radical after the British in the relief offered to neutral commerce was that of the United States, on behalf of which Admiral Sperry read a formal declaration that they were in favour of the complete abolition of conditional contraband. After this comes the Brazilian proposal, which qualified the abolition of conditional contraband by a permission to belligerents to sequester or preempt certain named articles—victuals, coal, raw cotton and men's clothing—when destined either for an enemy port or for a neutral one clearly proved to be a stage (*étape*) towards an enemy destination. The German proposal maintained conditional contraband when diplomatically declared in advance by the belligerent government, as might have been expected from the line which we have mentioned as that of the late Dr. Perels, but gave to the doctrine of continuous voyage only the limited support which it might derive from the admission of a peremptory presumption against the goods when addressed to the authorities of the enemy power or to a contractor with it (*fournisseur militaire*), or when destined for a fortified place of the enemy's country, or some other place serving as a base (*point d'appui*) for his forces. The least favourable proposal to neutral commerce was that of France, which limited absolute contraband rather strictly, but, while nominally proclaiming the freedom of neutral commerce in all things not

absolutely contraband, allowed to the belligerents the power of "restraining its freedom" by a diplomatic notification of the things which they intended to intercept, these to be confiscated if their hostile purpose (*but nettement hostile*) is proved, otherwise to be pre-empted. It may be said of this, as of the very similar proposal of the Institute of International Law, that the excessive interference with neutral commerce which it would authorise would not be compensated by an indemnity to be obtained only after delay and often also after litigation. From M. Renault's speech it appeared that France maintained the doctrine of continuous voyage, and from M. Kriege's that Germany desired to abolish it.

Westlake, vol. 2, pp. 289, 290.

### History.

From the beginning there were two currents of opinion, one in favor of the prevention of neutral trade in weapons and munitions of war, and the other in favor of a prohibition of all supplies which might be useful in any way for warlike purposes. \* \* \* We may say at once, in order to make what follows intelligible, that from the beginning England stood for the doctrine that other objects than arms and munitions of war could be treated as contraband when surrounding circumstances showed that they were destined for the warlike uses of the enemy, while France upheld the view that nothing was contraband but what had no use except for war. The remarks of Grotius on the subject show that at the beginning of the seventeenth century the law of contraband was in its infancy and had hardly begun to be distinguished from a law of blockade. During the latter half of the seventeenth century we find important treaties which accentuate the differences we have remarked on. In the eighteenth century the decisions of prize courts reduced the opposing views to system, and gave to them legal shape. The nineteenth century was a century of definition and discussion, and the twentieth has begun as a century of reconciliation. \* \* \* The signatures of England and France stand at the foot of the Declaration of London, which contains a truly international law of contraband drawn up largely through the efforts of the distinguished plenipotentiaries of the two states.

Lawrence, pp. 697, 698.

Since the law of nations gives to states at war the right of stopping neutral trade in contraband goods by the use of armed force on the high seas, it is obvious that some general agreement as to the articles which come under the description of contraband is necessary in order to avoid constant friction. But till lately no agreement existed except with regard to a very small portion of the large field to be covered. Arms and munitions of war were recognized as being contraband, and there unanimity ended.

Lawrence, pp. 702, 703.

### Naval stores and horses.

\* \* \* meanwhile it will be advisable to show what confusion existed down to 1909, the date of the Declaration of London, as to the contraband or non-contraband character of goods other than weapons and ammunition. Whichever way we turn we meet nothing

but disagreement and inconsistency. Publicist differs from publicist and state from state. Even the same state champions one policy at one time and another at another, and places different lists of contraband goods in different treaties negotiated during the same period.

\* \* \* As an example of what took place, we may cite the action of Great Britain and the United States with regard to two out of the many classes of disputed goods, naval stores, and horses. The treaty of 1794 between these powers included the former in its list of contraband articles. Yet in the next year the United States expressly excluded them in its treaty with Spain, following thereby its own precedents in the French treaty of 1778, the Dutch treaty of 1782, and the Swedish treaty of 1783. Horses were not included in the list of the treaty with England of 1794; but they are expressly mentioned in the treaty of 1782 with the United Netherlands, though by its twenty-fourth article naval stores were ruled out in the most emphatic terms. The French treaty of 1778 included them. The French treaty of 1800 excluded them. They are mentioned as contraband in the treaty with Sweden of 1783 and the treaty with Spain of 1795. They are not mentioned in the Prussian treaties of 1785 and 1799. During the nineteenth century a list of contraband goods was inserted in many of the treaties of the United States, the general tendency being toward the inclusion of horses and the exclusion of naval stores. Great Britain on the other hand preferred to keep herself free from special agreements on the subject. Since the close of the eighteenth century she has entered into stipulations with regard to it very sparingly. But small in number as were her treaty-lists of contraband, they were not consistent with each other. Both horses and naval stores, for instance, were declared to be subject to confiscation in her treaty of 1810 with Portugal, but seventeen years after she agreed with Brazil to omit the former while retaining the latter.

Lawrence, pp. 703, 704.

It is clear that no authoritative list of contraband articles can be compiled from diplomatic documents. An examination of the works of publicists leads to a corresponding conclusion. But amid conflicting views it is possible to discern two main tendencies. The first favored a long list of contraband goods and divided them into the two classes of those which are always contraband and those which are contraband or not according to circumstances. It may, as we have already seen, be called English, since its chief defenders are to be found among the jurists and statesmen of Great Britain. The second deemed comparatively few articles to be contraband, but placed them all in the first class, holding that the same thing could not be contraband in one set of conditions and innocent in another. As its chief supporter was France, though she was followed by other continental powers, it may be called French. In this matter, as in several others connected with maritime law, America occupies an intermediate position. In her treaties and her state papers she generally followed European, and especially French, models; while her courts and her legal luminaries as a rule supported English views.

Lawrence, p. 705.

In its more fully developed form the English doctrine divided contraband articles into *goods absolutely contraband* and *goods conditionally contraband*. Among the former it reckoned not only arms of all kinds and the machinery for manufacturing them, ammunition and the materials of which it is made, gun-cotton and clothing for soldiers, but also military and naval stores, including in the latter marine engines and their component parts, such as cylinders, shafts, boilers, and firebars. These things were declared to be contraband always and in every case. They were condemned on mere inspection, provided, of course, that they were bound to an enemy destination. They carried their guilt on their face, and were invariably liable to seizure and confiscation.

Lawrence, pp. 705, 706.

There is such a vast amount of loose thinking and writing on the subject of contraband that it will be advisable to set forth here in close juxtaposition the essentials which must coexist before an offence is committed, though they have all been mentioned incidentally in the former part of this chapter. We must note in the first place that it is transport, and not bargain and sale, which the law of contraband aims at. Neutral traders are free to sell arms and other contraband goods within the neutral territory to agents of the warring powers. It is only when they export such articles to one belligerent that the right of capture is acquired by his enemy. In other words the *commerce passif* of recent continental writers is allowed, but the *commerce actif* is left to the mercy of the belligerent who suffers from it. This is an old and well-established rule. Bynkershoek lays it down in the terse sentence, *Non recte vehamus, sine fraude tamen vendimus*. It is the doctrine of the prize courts of all civilized peoples, and has never been controverted except by those theorists who would lay on neutral states the unendurable burden of preventing all traffic in munitions of war between their subjects and the belligerent powers.

Secondly, a belligerent destination is essential. This is implied in rule after rule of the Declaration of London, and is stated with the utmost clearness in the Report of the Drafting Committee, which was drawn up by M. Renault, the distinguished French jurist who represented his country at the Naval Conference. A century ago it was so fixed and settled a principle that a British court released a neutral Danish vessel, captured at Cape Town in 1806, on the ground that Great Britain was in possession of the place when she arrived, and therefore "long before the time of seizure these goods (i. e. her cargo) had lost their noxious character of going as contraband to an enemy's port." A few years later a hostile fleet lying in a neutral port was adjudged by an American decision to be a belligerent destination. Sweden was neutral in the war of 1812-1814 between Great Britain and the United States, and the *Commercen*, a Swedish vessel, was engaged in a voyage from Cork to the neutral Spanish port of Bilboa. But she carried a cargo of grain, and it was shown that her captain meant to deliver it to a British fleet lying in the harbor. The vessel was captured before she reached her destination by an American privateer, and the case came finally before the Supreme Court, which condemned the cargo on the ground of hostile destination. The principle holds good when there is no question

of a port of any kind. To supply the fleets or single cruisers of a belligerent with munitions of war on the open sea would be as clear a case of contraband as carrying a consignment of shells to a naval arsenal.

Thirdly and lastly, the offence is complete the moment a neutral vessel laden with contraband leaves neutral waters for a belligerent destination, and is "deposited" the moment the destination is reached and the goods delivered thereat, and not dumped down elsewhere as a blind. As Lord Stowell said, in the case of the *Imina*, "The articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port." The offence generally exists from the beginning to the end of the outward voyage, and ceases to exist the moment the contraband goods are placed in the hands of the enemy. But if during the voyage the guilty destination has been changed for an innocent one, as happened in the case of the *Imina* cited above, or if a hostile destination becomes friendly through surrender or cession, then a capture made after the change has been effected will not result in condemnation.

Lawrence, pp. 719-721; Quaestiones Juris Publici, bk. I. ch. 22; British Parliamentary Papers, Miscellaneous, No. 4 (1909), p. 43; The *Trende Sostre*, 6 C. Rob., 390-392, note; 1 Wheaton, 382; Takahashi, pp. 73-107, case of the *Yiksang*; 3 C. Rob., 168.

Contraband of war is the designation of such goods as by either belligerent are forbidden to be carried to the enemy on the ground that they enable the latter to carry on the war with greater vigour. But this definition is only a formal one, as it does not state what kinds of goods belong to the class of contraband. This point was much controverted before the Declaration of London. Throughout the seventeenth, eighteenth, and nineteenth centuries the matter stood as Grotius had explained it. Although he does not employ the term contraband, he treats of the matter. He distinguishes three different kinds of articles. Firstly, those which, as arms for instance, can only be made use of in war, and which are, therefore, always contraband. Secondly, those, as for example articles of luxury, which can never be made use of in war and which, therefore, are never contraband. Thirdly, those which, as money, provisions, ships, and articles of naval equipment, can be made use of in war as well as in peace, and which are on account of their ancipitous use contraband or not according to the circumstances of the case. In spite of Bynkershoek's decided opposition to this distinction by Grotius, the practice of most belligerents until the beginning of the twentieth century has been in conformity with it. A great many treaties have from the beginning of the sixteenth century been concluded between many States for the purpose of fixing what articles belonging to the class of ancipitous use should, and what should not, be regarded between the parties as contraband, but these treaties disagree with one another. And, so far as they were not bound by a treaty, belligerents formerly exercised their discretion in every war according to the special circumstances and conditions in regarding or not regarding certain articles of ancipitous use as contraband. The endeavor of the First and the Second Armed Neutrality of 1780 and 1800 to restrict the number and kinds of articles that could be regarded as contraband failed, and the Declaration of Paris of 1856 uses the term contraband without any attempt to define it.



It is by the Declaration of London that the Powers have, for the first time in history, come to an agreement concerning what articles are contraband. The distinction which Grotius made between three classes of goods, while still recognised, has been merged by the Declaration of London into the distinction between articles of absolute contraband, articles of conditional contraband, and such articles as may under no circumstances or conditions be considered contraband. This Declaration, moreover, has put the whole matter of contraband upon a new basis, since the Powers have by articles 22 to 44 agreed upon a common code of rules concerning contraband.

Oppenheim, vol. 2, pp. 480-481; Grotius, III, C. I, sec. 5; Bynkershoek, Quaest. jur. publici, I, c. X.

Apart from the distinction between articles which can be made use of only in war and those of ancipitous use, two different classes of contraband must be distinguished.

There are, firstly, articles which by their very character are destined to be made use of in war. In this class are to be reckoned not only arms and ammunition, but also such articles of ancipitous use as military stores, naval stores, and the like. They are termed absolute contraband.

There are, secondly, articles which by their very character are not destined to be made use of in war, but which under certain circumstances and conditions can be of the greatest use to a belligerent for the continuation of the war. To this class belong, for instance, provisions, coal, gold, and silver. These articles are termed conditional or relative contraband.

Although hitherto not all the States have made this distinction, nevertheless they did make a distinction in so far as they varied the list of articles which they declared contraband in their different wars; certain articles, as arms and ammunition, have always been on the list, whilst other articles were only considered contraband when the circumstances of a particular war made it necessary. The majority of writers have always approved of the distinction between absolute and conditional contraband, although several insisted that arms and ammunition only and exclusively could be recognized as contraband, and that conditional contraband did not exist. The distinction would seem to have been important not only regarding the question whether or no an article was contraband, but also regarding the consequences of carrying contraband.

The Declaration of London has adopted (articles 22 and 24) the distinction between absolute and conditional contraband, but it distinguishes, besides these two classes of articles, a third class (article 27). To this class belong all articles which are either not susceptible of use in war, or the possibility of the use of which in war is so remote as practically to make them not susceptible of use in war. These articles are termed *free articles*.

Oppenheim, vol. 2, pp. 481-483.

That absolute contraband cannot and need not be restricted to arms and ammunition only and exclusively becomes obvious, if the fact is taken into consideration that other articles, although of ancipitous use, can be as valuable and essential to a belligerent for the continuance of the war as arms and ammunition. The necessary machinery

and material for the manufacture of arms and ammunition are almost as valuable as the latter themselves, and warfare on sea can as little be waged without vessels and articles of naval equipment as without arms and ammunition. But formerly no unanimity existed with regard to such articles of ancipitous use as had to be considered as absolute contraband, and States, when they went to war, increased or restricted, according to the circumstances of the particular war, the list of articles they considered absolute contraband.

According to the British practice which has hitherto prevailed—subject, however, to the prerogative of the Crown to order alterations of the list during a war—the following articles were considered absolute contraband:—

Arms of all kinds, and machinery for manufacturing arms; ammunition, and materials for ammunition, including lead, sulphate of potash, muriate of potash (chloride of potassium), chlorate of potash, and nitrate of soda; gunpowder and its materials, saltpetre and brimstone, also guncotton; military equipments and clothing; military stores; naval stores, such as masts, spars, rudders, ship timbers, hemp and cordage, sailcloth, pitch and tar, copper for sheathing vessels, marine engines and the component parts thereof (including screw propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler-plates and fire bars), maritime cement and the materials used for its manufacture (as blue lias and Portland cement), iron in any of the following forms: anchors, rivet-iron, angle-iron, round bars of from  $\frac{3}{4}$  to  $\frac{5}{8}$  of an inch diameter, rivets, strips of iron, sheet plate-iron exceeding  $\frac{1}{4}$  of an inch, and Low Moor and Bowling plates.

Oppenheim, vol. 2, pp. 483–484.

#### Horses and other beasts of burden.

The importance of *horses and other beasts of burden* for cavalry, artillery, and military transport explains their frequently being declared as contraband by belligerents. No argument against their character as conditional contraband can have any basis. But they were frequently declared absolute contraband, as, for instance, by article 36 of the United States Naval War Code of 1900. Russia, which during the Russo-Japanese War altered the standpoint taken up at first by her, and recognized the distinction between absolute and conditional contraband, nevertheless maintained her declaration of horses and beasts of burden as absolute contraband.

Oppenheim, vol. 2, pp. 486–487.

The guaranteed freedom of commerce making the sale of articles of all kinds to belligerents by subjects of neutrals legitimate, articles of conditional as well as absolute contraband may be supplied by sale to either belligerent by these individuals. And the carriage of such articles by neutral merchantmen on the Open Sea is, as far as International Law is concerned, quite as legitimate as their sale. The carrier of contraband by no means violates an injunction of the Law of Nations. But belligerents have by the Law of Nations the right to prohibit and punish the carriage of contraband by neutral merchantmen, and the carrier of contraband violates, for this reason, an injunction of the belligerent concerned. It is not International Law, but the Municipal Law of the belligerents, which makes carriage of

contraband illegitimate and penal. The question why the carriage of contraband articles may nevertheless be prohibited and punished by the belligerents, although it is quite legitimate so far as International Law is concerned, can only be answered by a reference to the historical development of the Law of Nations. In contradistinction to former practice, which interdicted all trade between neutrals and the enemy, the principle of freedom of commerce between subjects of neutrals and either belligerent has gradually become universally recognised; but this recognition included from the beginning the right of either belligerent to punish carriage of contraband on the sea. And the reason obviously is the necessity for belligerents in the interest of self-preservation to prevent the import of such articles as may strengthen the enemy, and to confiscate the contraband cargo, and eventually the vessel also, as a deterrent to other vessels.

The present condition of the matter of carriage of contraband is therefore a compromise. In the interest of the generally recognised principle of freedom of commerce between belligerents and subjects of neutrals, International Law does not require neutrals to prevent their subjects from carrying contraband; on the other hand, International Law empowers either belligerent to prohibit and punish carriage of contraband just as it \* \* \* empowers either belligerent to prohibit and punish breach of blockade.

The Declaration of London has in no way altered the existing condition of the matter. The fact that articles 22 and 24 give a list of articles which, without special declaration and notice, may always be treated as absolute and conditional contraband respectively, does not involve the forbidding by International Law of the carriage of the articles. Articles 22 and 24 are certainly part of International Law, yet they merely embody an agreement as to what goods may—but they need not—be treated as contraband.

Oppenheim. vol. 2. pp. 495-497.

U. S. TREASURY CIRCULAR, 1862—MR. CHASE TO COLLECTORS OF CUSTOMS.

TREASURY DEPARTMENT, *May 23, 1862.*

SIR: In pursuance of the provisions of the proclamation of the President, modifying the blockade of the ports of Beaufort, Port Royal, and New Orleans, and of the regulations of the Secretary of the Treasury relating to trade with those ports, no articles contraband of war will be permitted to enter at either of said ports, and you will accordingly refuse clearance to vessels bound for those ports, or either of them, with any such articles on board.

Until further instructed, you will regard as contraband of war the following articles, viz: cannons, mortars, fire-arms, pistols, bombs, grenades, firelocks, flints, matches, powder, saltpetre, balls, bullets, pikes, swords, sulphur, helmets or boarding-caps, sword-belts, saddles and bridles, (always excepting the quantity of the said articles which may be necessary for the defence of the ship and of those who compose the crew,) cartridge-bag material, percussion and other caps, clothing adapted for uniforms, rosin, sail-cloth of all kinds, hemp and cordage, masts, ship-timber, tar and pitch, ardent spirits, military persons in the service of the enemy, despatches of the enemy, and articles of like character with those specially enumerated. You will also refuse clearances to all vessels which, whatever the ostensible des-

tionation, are believed by you, on satisfactory grounds, to be intended for ports or places in possession or under control of insurgents against the United States, or that there is imminent danger that the goods, wares, or merchandise, of whatever description, laden on such vessels, will fall into the possession or under the control of such insurgents; and in all cases where, in your judgment, there is ground for apprehension that any goods, wares, or merchandise, shipped at your port, will be used, in any way for the aid of the insurgents or the insurrection, you will require substantial security to be given that such goods, wares, or merchandise, shall not be transported to any place under insurrectionary control, and shall not, in any way, be used to give aid or comfort to such insurgents.

You will be especially careful upon application for clearances to require bonds, with sufficient sureties, conditioned for fulfilling faithfully all the conditions imposed by law or departmental regulations, from shippers of the following articles to the ports opened, or to any other ports from which they may easily be, and are probably intended to be, re-shipped in aid of the existing insurrection, namely: liquors of all kinds other than ardent spirits, coals, iron, lead, copper, tin, brass, telegraphic instruments, wire, porous cups, platina, sulphuric acid, zinc, and all other telegraphic materials, marine engines, screw propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, fire-bars, and every article or other component part of an engine or boiler, or any article whatever which is, can or may become applicable for the manufacture of marine machinery, or for the armor of vessels.

I am, very respectfully,

S. P. CHASE,  
*Secretary of the Treasury.*

In order that Goods may be Contraband, two conditions are necessary:—

1. The Goods must be fit for purposes of war exclusively, or for purposes of war as well as of peace.

2. They must be destined for the use of the Enemy in war.

Corresponding to these conditions, two points will have to be ascertained by the Commander, when he suspects a Vessel to be carrying Contraband, viz.:—

1. The character of the Goods on board.

2. The destination of the Vessel, which is conclusive as to the destination of the Goods on board.

Holland, p. 18.

It is part of the prerogative of the Crown during the war to extend or reduce the lists of Articles to be held Absolutely \* \* \* Contraband, subject, however, to any Treaty Engagements binding upon Great Britain.

Holland, p. 21.

The list of Goods Absolutely Contraband comprises:—

Arms of all kinds and machinery for manufacturing Arms.

Ammunition and materials for Ammunition, including Lead, Sulphate of Potash, Muriate of Potash (Chloride of Potassium), Chlorate of Potash, and Nitrate of Soda.

Gunpowder and its materials, Saltpetre and Brimstone; also Gun-Cotton.

Military Equipments and Clothing.

Military Stores.

Naval Stores, such as Masts, Spars, Rudders, and Ship Timber, Hemp and Cordage, Sail-cloth, Pitch and Tar; Cooper fit for sheathing vessels; Marine Engines, and the component parts thereof, including Screw-Propellers, Paddle-Wheels, Cylinders, Cranks, Shafts, Boilers, Tubes for Boilers, Boiler-Plates, and Fire-Bars; Marine Cement, and the materials used in the manufacture thereof, as Blue Lias and Portland Cement; Iron in any of the following forms—Anchors, Rivet-Iron, Angle-Iron, Round Bars of from  $\frac{3}{4}$  to  $\frac{5}{8}$  of an inch diameter, Rivets, Strips of Iron, Sheet Plate-Iron exceeding  $\frac{1}{4}$  of an inch, and Low Moor and Bowling Plates.

Holland, pp. 19 and 20.

**List of absolute contraband proclaimed by the United States in 1898.**

Ordnance; machine guns and their appliances and the parts thereof; armor plate, and whatever pertains to the offensive and defensive armament of naval vessels; arms and instruments of iron, steel, brass, or copper, or of any other material, such arms and instruments being specially adapted for use in war by land or sea; torpedoes and their appurtenances; cases for mines, of whatever material; engineering and transport materials, such as gun carriages, caissons, cartridge boxes, campaigning forges, canteens, pontoons; ordnance stores; portable range finders; signal flags destined for naval use; ammunition and explosives of all kinds; machinery for the manufacture of arms and munitions of war; saltpeter; military accoutrements and equipments of all sorts; horses.

Proclamation and Decrees of Neutrality (U. S. State Department publication), p. 88.

**List of contraband proclaimed by Spain in 1898.**

Art. VI. Under the denomination contraband of war, the following articles are included:—

Cannons, machine guns, mortars, guns, all kinds of arms and fire-arms, bullets, bombs, grenades, fuses, cartridges, matches, powder, sulphur, saltpeter, dynamite and every kind of explosive, articles of equipment like uniforms, straps, saddles and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair, and arming of war ships, and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband.

Proclamation and Decrees of Neutrality (U. S. State Department publication), pp. 93, 94.

In case of war, the articles that are conditionally and unconditionally contraband, when not specifically mentioned in treaties previously made and in force, will be duly announced in a public manner.

U. S. Naval War Code, 1900, Article 34.

The term "contraband of war" includes only articles having a belligerent destination and purpose. Such articles are classed under two general heads:

(1) Articles that are primarily and ordinarily used for military purposes in time of war, such as arms and munitions of war, military material, vessels of war, or instruments made for the immediate manufacture of munitions of war.

U. S. Naval War Code, 1900, Article 34.

Until otherwise announced, the following articles are to be treated as contraband of war:

*Absolutely contraband.*—Ordnance; machine guns and their appliances and the parts thereof; armor plate and whatever pertains to the offensive and defensive armament of naval vessels; arms and instruments of iron, steel, brass, or copper, or of any other material, such arms and instruments being specially adapted for use in war by land or sea; torpedoes and their appurtenances; cases for mines, of whatever material; engineering and transport materials, such as gun carriages, caissons, cartridge boxes, campaigning forges, canteens, pontoons; ordnance stores; portable range finders; signal flags destined for naval use; ammunition and explosives of all kinds and their component parts; machinery for the manufacture of arms and munitions of war; saltpeter; military accoutrements and equipments of all sorts; horses and mules.

U. S. Naval War Code, 1900, Article 36.

The following articles are deemed to be contraband of war:—

(1) Small arms of every kind, and guns, mounted or in sections, as well as armour-plates;

(2) Ammunition for fire-arms, such as projectiles, shell-fuses, bullets, priming, cartridges, cartridge-cases, powder, saltpetre, sulphur;

(3) Explosives and materials for causing explosions, such as torpedoes, dynamite, pyroxyline, various explosive substances, wire conductors, and everything used to explode mines and torpedoes;

(4) Artillery, engineering, and camp equipment, such as gun carriages, ammunition wagons, boxes or packages of cartridges, field kitchens and forges, instrument wagons, pontoons, bridge trestles, barbed wire, harness, &c.;

(5) Articles of military equipment and clothing, such as bandoliers, cartridge boxes, knapsacks, straps, cuirasses, entrenching tools, drums, pots and pans, saddles, harness, completed parts of military uniforms, tents, &c.;

(6) Vessels bound for an enemy's port, even if under a neutral commercial flag, if it is apparent from their construction, interior fittings, and other indications that they have been built for warlike purposes, and are proceeding to an enemy's port in order to be sold or handed over to the enemy;

(7) Boilers and every kind of naval machinery, mounted or unmounted.

(8) Every kind of fuel, such as coal, naphtha, alcohol, and other similar materials.

(9) Articles and material for the installation of telegraphs, telephones, or for the construction of railroads.

(10) Generally, everything intended for warfare by sea or land, as well as rice, provisions, and horses, beasts of burden, and other animals, which may be used for a warlike purpose, if they are transported on the account of, or are destined for, the enemy.

Russian Rules, 1904, sec. 6.

The following articles will, in the event of their being destined for the enemy territory, or for the enemy army or navy, be held to be contraband of war:—

Arms, ammunition, explosives, materials (including lead, saltpetre, sulphur, &c.) and machinery for making the same, cement, naval and military uniforms and accoutrements, armor-plate, materials for the building and fitting of ships of war or other ships, and all other articles which, though not coming under the above-mentioned list, are intended solely for use in war.

Japanese Regulations, 1904, Article 13.

Under the name of food-stuffs, to which allusion is made in section 10 of this Article, must be included among the number of articles which may be used for food-stuffs and forage for the Japanese army, "all kinds of grain, fish, fish products of various kinds, beans, bean oil cakes."

On the list of articles intended for warlike purposes, either on land or on sea, should figure machinery and parts of machinery intended for the manufacture of cannon, small arms, and projectiles.

Extract from the "Journal de Saint-Petersburg" of March 6 (19), 1904.

These [contraband articles] may include:

(a) Weapons of war (guns, rifles, sabers, etc., ammunition, powder and other explosives, and military conveyances, etc.).

(b) Any materials out of which this kind of war supplies can be manufactured, such as saltpeter, sulphur, coal, leather, and the like.

(c) Horses and mules.

(d) Clothing and equipment (such as uniforms of all kinds, cooking utensils, leather straps, and footwear).

(e) Machines, motor-cars, bicycles, telegraphic apparatus, and the like.

German War Book, pp. 191, 192.

21. The following will be regarded as contraband of war, without any official declaration, under the designation of absolute contraband articles and materials:—

1. Arms of every kind, including hunting weapons and all recognised parts belonging to them.

2. Projectiles, charges, and cartridges of all kinds, as well as their recognised parts belonging to them.

3. Powder and explosives which are especially intended for war use.

4. Gun mounts, ammunition, carriages, limbers, supply wagons, field forges, and their recognised parts.

5. Articles of clothing and equipment distinctly military.

6. Harness of all kinds distinctly military.

7. Mounts, draft and pack animals capable of use in war.

8. Camping equipment and its recognised parts.

9. Armor plate.

10. War ships and other war craft, as well as such parts as from their special nature can be used only on board a vessel of war.

11. Tools and equipment which have been constructed exclusively for the manufacture and repair of arms and land or sea war material.

22. Absolute contraband will include further those articles and materials which shall be expressly declared as absolute contraband by the German Empire.

German Prize Rules, 1909, Articles 21 and 22.

In the absence of special stipulation of treaties or of particular decisions of the government of the Republic, you will consider as contraband, without notice, the following articles and materials, included under the term *absolute contraband* whose hostile destination appears as set forth later on:

[The list which follows is identical with that contained in Article 22, Declaration of London, except for the omission in paragraph 10 of the first mentioned list, of the words "of such a nature that they can only be used on a vessel of war."]

French Naval Instructions 1912, sec. 29.

When circumstances require you will receive a supplementary list of articles and materials exclusively employed for war which the government judges advisable, during the hostilities, to add to the contraband articles above enumerated.

French Naval Instructions 1912, sec. 31.

Articles 22 and 23, Declaration of London, are substantially identical with sections 49, 50, respectively, Austro-Hungarian Manual, 1913.

#### Naval stores.

Naval stores apparently include everything which enters into the construction of ships of war.

These articles have been confiscated by the English prize courts in the following leading cases:

*The Staat Embden*, 1 C. Rob., 26 (masts); *The Endraught*, 1 C. Rob., 22 (timber); *The Jonge Tobias*, 1 C. Rob., 329 (tar); *The Sarah Christina*, 1 C. Rob., 237, 241 (tar and pitch); *The Rigende Jacob*, 1 C. Rob., 89 (hemp, iron bars); *The Neptunus*, 3 C. Rob., 108 (sail-cloth).

Most of these articles were treated by the court as absolute contraband, if going to an enemy's port, without regard to the nature of the port.

*The "Knight Commander," Russian and Japanese Prize Cases*, vol. 2, p. 54.—In this case, the Libau Prize Court held that the following goods were subject to condemnation when destined for enemy ports irrespective of the evidence as to the purpose for which they were intended:—

Cast-iron wheels and axles suitable for railways; wire suitable for telegraphs and telephones; parts of wagons for electric tramways; ball valves, hydrometers, steamcocks, oilers and lubricators useful



for steam boilers or locomotives; blades for shovels; nails suitable for shoeing.

*Cargo Ex "Hsiping," Russian and Japanese Prize Cases, vol. 2, pp. 135 and 140.*—Iron, screw-bolts, washers, lead, zinc, brass plates, German silver, sheets, and timber were condemned when captured on a neutral vessel and consigned to a port occupied as a Russian base depot.

See also *Cargo Ex Pehping, id., p. 164.*

*The "Cilurnum," Russian and Japanese Prize Cases, vol. 2, p. 186.*—Beans and antimony were held to be contraband.

*The "Bawtry," Russian and Japanese Prize Cases, vol. 2, p. 265.*—*Material and arms for building and equipping ships, destined for enemy's port, were held to be absolute contraband.*

*Cargo ex "Bawtry," Russian and Japanese Prize Cases, vol. 2, p. 270.*—The following articles were condemned as *materials for building or fitting ships* when captured on board a neutral vessel and destined for an enemy's port, used as a naval base: steel rope, rope, iron plates, wire netting, rivets, nails, iron sheets, screens, iron wire rigging, brass and copper plates, brass sheets, washers, fasteners, bent iron, iron ware, sail cloth, galvanised steel rope, pulley blocks, metal tubes, tin sheets, asbestos and rubber goods, tarred rope.

*The "Prinsesse Marie," Russian and Japanese Prize Cases, vol. 1, p. 276.*—The following articles were held to be contraband, when destined for Japanese ports: goods suitable for construction or equipment of telegraphs, telephones and railways as to which there were no grounds for holding that they were destined for other purposes; rails for mines; soft steel plates.

*The "Paros," Russian and Japanese Prize Cases, vol. 2, p. 301.*—The following articles were condemned as absolute contraband, when captured on board a neutral ship and destined for an enemy's port: cement, field blacksmith's tools, sheet iron, iron nails, asbestos sheets, white metal bearings, rubber, packing for machinery, solder, tin, wire rope, linoleum, copper tubing, iron tubes, copper sulphate, zinc sheets, copper, copper sheets and brass sheets.

*Cargo ex "Lydia," Russian and Japanese Prize Cases, vol. 2, p. 367.*—The following articles were condemned as contraband when captured on a neutral ship and destined for a port used as an enemy's coastal fortress and supply-base: Axle grease, leather belting, grease, hemp ropes, machine oil, cylinder oil, washers, belting iron, acetic acid, oil cans and emery powder, all as materials for building or fitting ships.

**Persons are not contraband of war.**

*Yangtze Ins. Assn. v. Indemnity Mutual Marine Assurance Co., L. R. 1908, 1 K. B. D. p. 910 and 2 K. B. D. p. 504.*—This was an action brought on a policy of marine insurance effected by the plaintiffs with the defendants, which contained a warranty "no contraband of war."

Held that there was no breach of warranty by taking on board the vessel in question, as passengers to Vladivostock, two Russian officers, the carriage of whom brought about the condemnation of the vessel, on seizure by the Japanese.

LIST OF ARTICLES CONDITIONALLY CONTRABAND—ADDITIONS THERETO, HOW MADE.

The following articles, susceptible of use in war as well as for purposes of peace, may, without notice, be treated as contraband of war, under the name of conditional contraband:—

- (1) Foodstuffs.
- (2) Forage and grain, suitable for feeding animals.
- (3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.
- (4) Gold and silver in coin or bullion; paper money.
- (5) Vehicles of all kinds available for use in war, and their component parts.
- (6) Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts.
- (7) Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones.
- (8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.
- (9) Fuel; lubricants.
- (10) Powder and explosives not specially prepared for use in war.
- (11) Barbed wire and implements for fixing and cutting the same.
- (12) Horseshoes and shoeing materials.
- (13) Harness and saddlery.
- (14) Field Glasses, telescopes, chronometers, and all kinds of nautical instruments.

Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.—*Declaration of London, Articles 24 and 25.*

On the expression “de plein droit” (without notice) the same remark must be made as with regard to article 22. The articles enumerated are only conditional contraband if they have the destination specified in article 33.

Foodstuffs include products necessary or useful for sustaining man, whether solid or liquid.

Paper money only includes inconvertible paper money, i. e., bank notes which may or not be legal tender. Bills of exchange and checks are excluded.

Engines and boilers are included in (6).

Railway material includes fixtures (such as rails, sleepers, turntables, parts of bridges), and rolling stock (such as locomotives, carriages, and trucks).

Report of committee which drafted Declaration of London.

#### **Contra.**

An article shall not be considered contraband simply because it is intended to be used to aid or to favor an enemy, nor because it could be useful to an enemy or used by him for military purposes, nor because it is meant for his use.

Institute, 1896, pp. 129, 130.

#### **Contra, but with right of preemption.**

Are and shall remain abolished those so-called classes of contraband designated under the names, either of conditional contraband, articles (*usus ancipitis*) which may be used by a belligerent for military purposes, but the use of which is essentially peaceful, or of *accidental* contraband, when the said articles are not used especially for military purposes except in certain circumstances.

Nevertheless, the belligerent has the right, if he wishes and subject to his paying a just indemnity, of sequestration or pre-emption with regard to articles which are bound for a port of his adversary and which may be used either for purposes of peace or of war.

Institute, 1896, p. 130.

#### **Foodstuffs.**

The treaty [of 1794 between the United States and England] admitted that provisions were not generally contraband, but might become so, according to the existing law of nations, in certain cases, and those cases were not defined.

It was only stipulated, by way of relaxation of the penalty of the law, that whenever provisions were contraband, the captors, or their government, should pay to the owner the full value of the articles, together with the freight, and a reasonable profit. Our government has repeatedly admitted that, as far as that treaty enumerated contraband articles, it was declaratory of the law of nations, and that the treaty conceded nothing on the subject of contraband.

Kent, vol. 1, p. 145; Mr. Pickering's letter to Mr. Monroe, September 12, 1795; his letter to Mr. Pinckney, January 16, 1797; Instructions from the Secretary of State to the American minister to France, July 15, 1797.

#### **Foodstuffs.**

The national convention of France, on the 9th of May, 1793, decreed, that neutral vessels laden with provisions, destined to an enemy's port, should be arrested and carried into France; and one of the earliest acts of England, in that war, was to detain all neutral vessels going to France, and laden with corn, meal, or flour. It was

insisted, on the part of England, that, by the law of nations, all provisions were to be considered as contraband, in the case where the depriving of an enemy of those supplies was one of the means employed to reduce him to reasonable terms of peace; and that the actual situation of France was such as to lead to that mode of distressing her, inasmuch as she had armed almost the whole laboring class of her people, for the purpose of commencing and supporting hostilities against all the governments of Europe. This claim on the part of England was promptly and perseveringly resisted by the United States; and they contended that corn, flour, and meal, being the produce of the soil and labor of the country, were not contraband of war, unless carried to a place actually invested.

Kent, vol. 1, p. 144; Instructions of 8th June, 1793; Mr. Hammond's letter to Mr. Jefferson, September 12, 1793, and his letter to Mr. Randolph, April 11, 1794; Mr. Jefferson's letter to Mr. Pinckney, September 7, 1793, and Mr. Randolph's letter to Mr. Hammond, May 1, 1794.

### **Foodstuffs.**

The doctrine of the English Courts of Admiralty, as to provisions becoming contraband under certain circumstances of war, was adopted by the British government in the instructions given to their cruisers on the 8th June, 1793, directing them to stop all vessel laden wholly or in part with corn, flour, or meal, bound to any port in France, and to send them into a British port, to be purchased by government, or to be released, on condition that the master should give security to dispose of his cargo in the ports of some country in amity with His Britannic Majesty. This order was justified, upon the ground that, by the modern law of nations, all provisions are to be considered contraband, and, as such, liable to confiscation, wherever the depriving an enemy of these supplies is one of the means intended to be employed for reducing him to terms. The actual situation of France (it was said) was notoriously such, as to lead to the employing this mode of distressing her by the joint operations of the different powers engaged in the war; and the reasoning which the text-writers apply to all cases of this sort, was more applicable to the present case, in which the distress resulted from the unusual mode of war adopted by the enemy himself, in having armed almost the whole laboring class of the French nation, for the purpose of commencing and supporting hostilities against almost all European governments; but this reasoning was most of all applicable to a trade, which was in a great measure carried on by the then actual rulers of France, and was no longer to be regarded as a mercantile speculation of individuals, but as an immediate operation of the very persons who had declared war, and were then carrying it on against Great Britain.

This reasoning was resisted by the neutral powers, Sweden, Denmark, and especially the United States. The American government insisted, that when two nations go to war, other nations, who choose to remain at peace, retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry for exchange to all countries, belligerent or neutral, as usual; to go and come freely, without injury or molestation; in short, that the war among others should be, for neutral nations, as if it did not exist. The only restriction to this general

freedom of commerce, which has been submitted to by nations at peace, was that of not furnishing to either party implements merely of war, nor any thing whatever to a place blockaded by its enemy. These implements of war had been so often enumerated in treaties under the name of contraband, as to leave little question about them at that day. It was sufficient to say, that corn, flour, and meal, were not of the class of contraband, and consequently remained articles of free commerce. The state of war then existing between Great Britain and France furnished no legitimate right to either of these belligerent powers to interrupt the agriculture of the United States, or the peaceable exchange of their produce with all nations. If any nation whatever had the right to shut against their produce all the ports of the earth except her own, and those of her friends, she might shut these also, and thus prevent altogether the export of that produce.

In the treaty subsequently concluded between Great Britain and the United States, on the 19th November, 1794, it was stipulated, (article 18), that under the denomination of contraband should be comprised all arms and implements serving for the purposes of war, "and also timber for ship-building, tar or rosin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted." The article then goes on to provide, that, "*whereas the difficulty of agreeing on the precise cases, in which alone provisions and other articles, not generally contraband, may be regarded as such,* renders it expedient to provide against the inconveniences and misunderstandings which might thence arise; it is further agreed, that whenever any such articles, so becoming contraband according to the existing law of nations, shall for that reason be seized, the same shall not be confiscated; but the owners thereof shall be speedily and completely indemnified; and the captors, or, in their default, the government under whose authority they act, shall pay to the masters or owners of such vessels the full value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention."

The instructions of June, 1793, had been revoked previous to the signature of this treaty: but, before its ratification, the British government issued, in April, 1795, an Order in Council, instructing its cruisers to stop and detain all vessels, laden wholly or in part with corn, flour, meal, and other articles of provisions, and bound to any port in France, and to send them to such ports as might be most convenient, in order that such corn, &c., might be purchased on behalf of government.

This last order was subsequently revoked, and the question of its legality became the subject of discussion before the mixed commission, constituted under the treaty to decide upon the claims of American citizens, by reason of irregular or illegal captures and condemnations of their vessels and other property, under the authority of the British government. The Order in Council was justified upon two grounds:—

1. That it was made when there was a prospect of reducing the enemy to terms by famine, and that, in such a state of things, provisions bound to the ports of the enemy became so far contraband, as to justify Great Britain in seizing them upon the terms of paying

the invoice price, with a reasonable mercantile profit thereon, together with freight and demurrage.

2. That the order was justified by *necessity*; the British nation being at that time threatened with a scarcity of the articles directed to be seized.

The first of these positions was rested not only upon the general law of nations, but upon the above quoted article of the treaty between Great Britain and America.

The evidence adduced of this supposed law of nations was principally the following passage of Vattel:—"Commodities particularly useful in war, and the carrying of which to an enemy is prohibited, are called contraband goods. Such are arms, ammunition, timber for ship-building, every kind of naval stores, horses, and even provisions, in certain junctures, when we have hopes of reducing the enemy by famine."

In answer to this authority, it was stated that it might be sufficient to say that it was, at best, equivocal and indefinite, as it did not designate what the junctures are in which it might be held, that "there are hopes of reducing the enemy by famine;" that it was entirely consistent with it to affirm, that these hopes must be built upon an obvious and palpable chance of effecting the enemy's reduction by this obnoxious mode of warfare, and that no such chance is by the law of nations admitted to exist, except in certain defined cases; such as the actual siege, blockade, or investment of particular places. This answer would be rendered still more satisfactory, by comparing the above quoted passage with the more precise opinions of other respectable writers on international law, by which might be discovered that which Vattel does not profess to explain—the combination of circumstances to which his principle is applicable, or is intended to be applied.

But there was no necessity for relying wholly on this answer, since Vattel would himself furnish a pretty accurate commentary on the vague text which he had given. The only instance put by this writer, which came within the range of his general principle, was that which he, as well as Grotius, had taken from Plutarch. "Demetrius," as Grotius expressed it, "held Attica by the sword. He had taken the town of Rhamnus, *designing a famine in Athens*, and had almost accomplished his design, when a vessel laden with provisions attempted to relieve the city." Vattel speaks of this as of a case in which provisions were contraband, (section 17,) and although he did not make use of this example for the declared purpose of rendering more specific the passage above cited, yet as he mentions none other to which it can relate, it is strong evidence to show that he did not mean to carry the doctrine of special contraband further than that example would warrant.

It was also to be observed that, in section 113, he states expressly that all contraband goods, (including, of course, those becoming so by reason of the junctures of which he had been speaking at the end of section 112,) are to be confiscated. But nobody pretended that Great Britain could rightfully have *confiscated* the cargoes taken under the order of 1795; and yet if the seizures made under that order fell within the opinion expressed by Vattel, the confiscation of the cargoes seized would have been justifiable. It had long been settled, that

all contraband goods are subject to forfeiture by the law of nations, whether they are so in their own nature, or become so by existing circumstances; and even in early times, when this rule was not so well established, we find that those nations who sought an exemption from forfeiture, never claimed it upon grounds peculiar to any description of contraband, but upon general reasons, embracing all cases of contraband whatsoever. As it was admitted, then, that the cargoes in question were not subject to forfeiture as contraband, it was manifest that the juncture which gave birth to the Order in Council could not have been such a one as Vattel had in view; or, in other words, that the cargoes were not become contraband at all within the true meaning of his principle, or within any principle known to the general law of nations.

The authority of Grotius was also adduced, as countenancing this position.

Grotius divides commodities into three classes, the first of which he declares to be plainly contraband; the second plainly not so; and as to the third, he says:—"In tertio illo genere usûs ancipitis, distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat." This "causa alia" is afterwards explained by an example, "ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur."

This opinion of Grotius, as to the third class of goods, did not appear to proceed at all upon the notion of contraband, but simply upon that of a pure necessity on the part of the capturing belligerent. He does not consider the right of seizure as a means of effecting the reduction of the enemy, but as the indispensable means of our own defence. He does not state the seizure upon any supposed illegal conduct in the neutral, in attempting to carry articles of the third class, (among which provisions are included,) *not bound to a port besieged or blockaded*, to be lawful, when made with the mere view of annoying or reducing the enemy, but solely when made with a view to our own preservation or defence, under the pressure of that imperious and unequivocal necessity, which breaks down the distinctions of property, and, upon certain conditions, revives the original right of using things as if they were in common.

This necessity he explains at large in his second book, (cap. ii. sec. 6.), and, in the above recited passage, he refers expressly to that explanation. In sections 7, 8, and 9, he lays down the conditions annexed to this right of necessity: as, 1. It shall not be exercised until all other possible means have been used; 2. Nor if the right owner is under a like necessity; and, 3. Restitution shall be made as soon as practicable.

In his third book, (cap. XVII. sec. 1.) recapitulating what he had before said on this subject, Grotius further explains this doctrine of necessity, and most explicitly confirms the construction placed upon the above cited texts. And Rutherford, in commenting on Grotius, (lib. iii, cap. 1, sec. 5,) also explains what he there says of the right of seizing provisions upon the ground of necessity; and supposes his meaning to be that the seizure would not be justifiable in that view, "unless the exigency of affairs is such, that we cannot possibly do without them."

Bynkershoek also confines the right of seizing goods, not generally contraband of war, (and provisions among the rest,) to the above-mentioned cases.

It appeared, then, that so far as the authority of text-writers could influence the question, the Order in Council of 1795 could not be rested upon any just notion of contraband; nor could it, in that view, be justified by the reason of the thing or the approved usage of nations.

If the mere hope, however apparently well founded, of annoying or reducing an enemy, by intercepting the commerce of neutrals in articles of provision, (which, in themselves, are no more contraband than ordinary merchandise,) to ports not besieged or blockaded, would authorize that interruption, it would follow that a belligerent might at any time prevent, without a siege or blockade, all trade whatsoever with its enemy; since there is at all times reason to believe that a nation, having little or no shipping of its own, might be so materially distressed by preventing all other nations from trading with it, that such prevention might be a powerful instrument in bringing it to terms. The principle is so wide in its nature, that it is, in this respect, incapable of any boundary. There is no solid distinction, in this view of the principle, between provisions and a thousand other articles. Men must be clothed as well as fed; and even the privation of the conveniences of life is severely felt by those to whom habit has rendered them necessary. A nation, in proportion as it can be debarred its accustomed commercial intercourse with other States, must be enfeebled and impoverished; and if it is allowable to a belligerent to violate the freedom of neutral commerce, in respect to any one article not contraband *in se*, upon the expectation of annoying the enemy, or bringing him to terms by a seizure of that article, and preventing it reaching his ports, why not, upon the same expectation of annoyance, cut off as far as possible by captures, all communication with the enemy, and thus strike at once effectually at his power and resources?

As to the 18th article of the treaty of 1794, between the United States and Great Britain, it manifestly intended to leave the question where it found it; the two contracting parties, not being able to agree upon a definition of the cases in which provisions and other articles, not generally contraband, might be regarded as such, (the American government insisting on confining it to articles destined to a place actually besieged, blockaded, or invested, whilst the British government maintained that it ought to be extended to all cases where there is an expectation of reducing the enemy by famine,) concurred in stipulating, that "whenever any such articles, so becoming contraband, according to the existing law of nations, shall for that reason be seized, the same shall not be confiscated," but the owners should be completely indemnified in the manner provided for in the article. When the law of nations existing at the time the case arises pronounces the articles contraband, they may for that reason be seized; when otherwise, they may not be seized. Each party was thus left as free as the other to decide whether the law of nations, in the given case, pronounced them contraband or not, and neither was obliged to be governed by the opinion of the other. If one party, on a false pretext of being authorized by the law of nations, made a seizure,



the other was at full liberty to contest it, to appeal to that law, and, if he thought fit, to resort to reprisals and war.

As to the second ground upon which the Order in Council was justified, *necessity*, Great Britain being, as alleged at the time of issuing it, threatened with a scarcity of those articles directed to be seized, it was answered that it would not be denied that extreme necessity might justify such a measure. It was only important to ascertain whether that necessity then existed, and upon what terms the right it communicated might be carried into exercise.

Grotius, and the other text-writers on the subject, concurred in stating that the necessity must be real and pressing; and that even then it does not confer a right of appropriating the goods of others, until all other practicable means of relief have been tried and found inadequate. It was not to be doubted that there were other practicable means of averting the calamity apprehended by Great Britain. The offer of an advantageous market in the different ports of the kingdom, was an obvious expedient for drawing into them the produce of other nations. Merchants do not require to be forced into a profitable commerce; they will send their cargoes where interest invites; and if this inducement is held out to them in time, it will always produce the effect intended. But so long as Great Britain offered less for the necessaries of life than could have been obtained from her enemy, was it not to be expected that neutral vessels should seek the ports of that enemy, and pass by her own? Could it be said that, under the mere apprehension (not under the actual experience) of scarcity, she was authorized to have recourse to the forcible means of seizing provisions belonging to neutrals, without attempting those means of supply which were consistent with the rights of others, and which were not incompatible with the exigency? After this order had been issued and carried into execution, the British government did what it should have done before; it offered a bounty upon the importation of the articles of which it was in want. The consequence was, that neutrals came with these articles, until at length the market was found to be overstocked. The same arrangement, had it been made at an earlier period, would have rendered wholly useless the order of 1795.

Upon these grounds, a full indemnification was allowed by the commissioners, under the seventh article of the treaty of 1794, to the owners of the vessels and cargoes seized under the Orders in Council, as well for the loss of a market as for the other consequences of their detention.

Dana's Wheaton, pp. 621-629; Waite's State Papers, 1, 398; *ib.*, 393; *Droit des Gens*, liv. iii, ch. 7, sec. 112; Rutherford's *Inst.*, vol. ii, ch. 9, sec. 19; Bynkershoek, *Quaest. Jur. Pub.*, lib. i, cap. 9; Proceedings of the Board of Commissioners under the seventh article of the treaty of 1794, MS. opinion Mr. Pinkney, case of *Neptunc*.

It may be safely assumed, that prize courts of Great Britain and the United States, in the absence of treaty stipulations or of rules of their governments, would inquire into the circumstances of each case, to determine whether articles *ancipitis usûs* were contraband of war; and that in that class they would include ships, marine steam-machinery, masts and spars in a manufactured state, the component mate-

rials of gunpowder, coals, articles in a manufactured state chiefly useful in war, or the component parts of armaments and military equipments. The chief circumstance of inquiry would naturally be the port of destination. If that is a naval arsenal, or a port in which vessels of war are usually fitted out, or in which a fleet is lying, or a garrison town, or a place from which a military expedition is fitting out,—the presumption of military use would be raised, more or less strongly according to the circumstances. The nature and character of the war, as being maritime or not, and the known special needs of the enemy, are also to be considered. If it is proved, as a fact in the case, that the articles are destined directly to military use,—as, if they were to be delivered to an enemy's fleet, or army, or war department,—they would be condemned for the further reason of being involved in a non-neutral trade.

\* \* \* But it is not necessary that there should be a proved intent to deliver into military hands to make the case one of contraband. The neutral will usually send his goods—whether purely contraband or *ancipitis usûs*, the one as well as the other—to a private consignee, for sale in the market. He usually has, in fact, no intent in the matter but a commercial one, to sell his goods for the highest price. If his mortar and loaded shells will get a higher price from a humane society, to be placed on the coast to aid in rescuing shipwrecked mariners, or if his gunpowder will sell better to be used in blasting rocks, to build a church, his consignee will probably make such sales. The expectation or preference of the neutral for one use or another, belligerent or peaceful, of his goods, irrespective of their price, can rarely be ascertained by a prize court as a fact; and, if articles useful in war come within a belligerent's control, the belligerent government may buy them, or, in case of necessity, seize them, making compensation, without regard to the wishes of the owner or his agent. The truth is, the intent of the owner is not the test. The right of the belligerent to prevent certain things getting into the military use of his enemy, is the foundation of the law of contraband; and its limits are, as in most other cases, the practical result of the conflict between this belligerent right, on the one hand, and the right of the neutral to trade with the enemy, on the other. Belligerent interests might well contend, that any merchandise sent into his enemy's country gives that enemy aid or relief, moral, financial, or physical. But to prevent such trade, would be to end all neutral commerce. Neutral interests, therefore, insist on the strictest limits of the war-right of seizure, and have, at times, striven to confine the rule to instruments which are completed, and are of exclusively military use. The result of this conflict has left rather an undefined and irregular line. Articles of doubtful use the belligerent seeks to condemn, on evidence or presumptions that they were in fact intended to be, or would in fact become, whatever the intent, a direct contribution to the military force of his enemy. The chief maritime belligerents have enforced this right, while the chief neutrals have argued against it, in their books and diplomatic letters, and sought to restrict it in their treaties. So, where articles are not of a military character, but suitable for household food, as bread-stuffs, the belligerent claims the right to capture them, if bound to a

port under the stress of actual siege, where the fate of the place may depend on the mere question of food. The ground is, that the circumstances necessarily bring the food into the category of a direct supply of the military necessities of the enemy.

Dana's Wheaton, Note 226.

#### Fuel.

During the Crimean war, the English stopped coals on their way to a Russian port; but the Ministry said, in the debate in the House of Commons, that coals were to be regarded as *ancipitis usûs*.

The royal proclamation of 13th May, 1859, issued during the war between France, Sardinia, and Austria, warns British subjects against carrying contraband, without attempting to define it. To an inquiry, addressed by British merchants to the Foreign Office, the government declined to decide whether coals were contraband, but added, "It appears, however, to Her Majesty's Government, that, having regard to the present state of naval armaments, coal may, in many cases, be rightly held to be contraband of war, and therefore that all who engage in the traffic must do so at a risk, from which Her Majesty's Government cannot relieve them."

The royal proclamation of 13th May, 1861, (at the beginning of the civil war in the United States), warns British subjects against carrying "arms, military stores, or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations, for the use or service of either of the said contending parties." On the 26th May, a debate springing up in the House of Lords on the subject, Earl Granville, after referring to articles clearly contraband, said, "There are certain other articles the character of which can be determined only by the circumstances of the case." Lord Brougham thought coal might be contraband, "if furnished to one belligerent to be used in warfare against the other." Lord Kingsdown said, with more precision, "If coals are sent to a port where there are war-steamers, with a view of supplying them, they become contraband."

Dana's Wheaton, Note 226.

The principal point in dispute is as to articles admitted to be of ambiguous or uncertain use, when in the enemy's country and in time of war. The best illustration of this class is, perhaps, manufactured spars fully ready to be put into ships; and, in later times, marine steam machinery, in like condition of readiness. One class of writers contends for an absolute rule as to all articles of such descriptions; so that, if, upon the application of the general test, they are left *ancipitis usûs*, they must be free, and no further inquiry can be made for the purpose of ascertaining their probable use in the particular case. Another class of writers contends, that, as to such articles, inquiry may be made into the circumstances, for the purpose of determining their probable use in the particular instance. This is really the point of difference, on principle, among the later writers. The latter rule has been unquestionably the British doctrine, enforced by her Orders in Council and prize courts, recognized in her treaties, and sustained by her statesmen and text-

writers. (Reddie on Marit. Intern. Law, ii, 456. Phillimore's Intern. Law, iii, 245-284. Wildman's Intern. Law, ii, 210 *et seq.* Manning's Law of Nations, 282 *et seq.* Moseley on Contraband, *passim*.) It may also be said, in the main, to have been the American doctrine.

Dana's Wheaton, Note 226.

All writers on international law are agreed, that implements and munitions of war, and articles, which, in their actual condition, are of immediate use for warlike purposes, are to be deemed contraband, whenever they are destined to an enemy's country, or to an enemy's use; but, beyond this, there is such a diversity of opinion among text writers that it is exceedingly difficult, if not impossible, to deduce from such works any well established and satisfactory principles to guide our decision on the points in dispute. \* \* \*

And the same discordancy in the definition of contraband is to be found in the conventional law of nations, as established by treaties, the provisions of which are various and contradictory,—even of those made, at different periods, between the same nations. The same may be said of marine ordinances and diplomatic discussions. \* \* \*

Again, if we recur to the decisions of prize courts, although we shall find less discordancy, perhaps, than in the other sources of international law, we nevertheless shall encounter a diversity of sentiment, on some points, which it would be vain to attempt to reconcile. Even in the same country, at different periods, the decisions have been various and contradictory.

Halleck, pp. 577, 580, 582.

English authors have generally favored the views of their government in its extension of the list of contraband to all articles of promiscuous use in peace and war. \* \* \* The continental writers, generally, contend against the English extension of contraband.

Halleck, p. 579.

Articles in a rough state, which may be used for military and naval purposes, may, or may not, be contraband, according to their nature and destined use, as inferred from their immediate destination. Thus, pitch, tar and hemp, destined to the enemy's use, are generally held to be contraband in their nature, but where they are the produce of the neutral country from which they are exported, and are the property of its subjects or citizens, they are exempt from confiscation, except when they are exclusively and immediately destined to warlike use. Ship-timber, in a rough state, is not *in se* contraband, but it may become so from its particular character, as masts and spars, or from the character of its port of destination. Copper is not generally contraband, but if in sheets, adapted to the sheathing of vessels, it is condemned. Hemp is more favorably considered than cordage. Rosin is not generally contraband, but is condemned if going to a port of naval equipment. Iron itself is treated with indulgence, but if of such a form as to make it suitable for military or naval purposes, and its immediate destination is for such use, it cannot claim the benefit of exemption. The same rule would probably be applied to all unwrought materials for ship building, and

for the construction of marine machinery. Since the introduction of steam as the motive power in ships of war, the question has been much discussed in Europe, whether coals are to be considered as contraband. They would seem now to properly belong to the same class as ship-timber, tar, pitch, and other unwrought materials for ship building and naval stores. In the recent war between the allies and Russia, the English cruisers stopped coals on their way to an enemy's port on the Black sea, though it appears, from an answer already referred to, given in the house of commons by Sir James Graham, that they would be regarded by British cruisers as one of the articles *ancipitis usus*, not necessarily contraband, but liable to detention under circumstances that warrant suspicion of their being destined to the military or naval uses of the enemy. Ortolan first expressed the opinion that coals might, or might not, according to their intended use, be classed as prohibited articles; but he afterward corrected this statement, and concluded that they never can, under any circumstances, become contraband of war. This view of the question is ably advocated by Hautefeuille.

Halleck, pp. 584, 585; Ortolan, *Dip. de la Mer*, liv. 3, ch. 6; Hautefeuille, *Des Nations Neutrals*, tit. 8, sec. 2.

#### Foodstuffs.

It is universally admitted, that provisions (*commeatus belli*) are not, in their own nature, contraband. But while some contend that they never can become so under any circumstances, others hold, (and such is the uniform practice of the British admiralty,) that they may become liable to condemnation by their special destination and intended use. When they are destined to the immediate supply of the military or naval forces of the enemy, the aid thus intended to be given for the prosecution of the war, is so direct and important that the act of transportation is peculiarly noxious, and they are condemned without hesitation.

\* \* \* Nor, by the established doctrine of the English admiralty, is it in all cases necessary, in order to make provisions contraband, that the destination to the use of the enemy's military or naval forces should be certain. The rule of *ancipitis usus* is here applied, which deduces the final use from the immediate destination. If destined to a general commercial port, they are presumed to be for civil use, but if to a port whose predominant character is that of naval construction and equipment, they are presumed to be for military use. But such destination alone is not, as a general rule, sufficient to produce a condemnation. It must further appear that the provisions were, from their nature and quality, adapted to military use; since, otherwise, there would be no basis for the presumption that they would have been applied to that use, had their arrival been permitted.

Halleck, p. 587.

Upon the abstract merits of the question it is impossible to refuse sympathy to the more theoretical writers. They aim at giving the largest freedom that can be secured to the commerce of neutrals: in other words they aim at freeing the trade of persons who, taken in bulk, are probably injured by the mere existence of war, from

additional injuries inflicted through the restraints imposed by belligerents for their own selfish objects. But it is useless to represent as law, or to propose as future law, rules which states are not ready to accept; and it is idle to expect them to adopt rules which do not correspond with belligerent exigencies.

If these exigencies be taken instead of theory, as a starting point for definition of contraband, the proposition that contraband cannot be limited to munitions of war, and that the articles composing it must vary with the circumstances of particular cases, becomes the simple expression of common sense. There can be no question that many articles, of use alike in peace and war, may occasionally be as essential to the prosecution of hostilities as are arms themselves; and the ultimate basis of the prohibition of arms is that they are essential. The reason that no difference of opinion exists with respect to them is the fact that they are in all cases essential. But it may also happen, after a remote non-manufacturing country, such as Brazil, has suffered a disaster at sea, that to prevent the importation of marine engines would be equivalent to putting an end to the war, or would at least deprive the defeated nation of all power of actively annoying its enemy. Marine engines become as essential as arms. In considering the matter logically therefore the mind must chiefly be fixed upon the characteristic of essentiality; and in determining under what circumstances the seizure of merchandise of double use can be justified the main difficulty is either to find a general test of essentiality, or in a given instance to secure adequate proof that delivery of particular articles would be essential to the prosecution of the war.

Hall, pp. 680, 681.

In theory it is easy to distinguish between merchandise which, by its nature and absence of a certain kind of destination, is presumably intended for civil use, and merchandise which, by its nature or clear destination, is obviously intended for use by the armed forces of the state. A general test is thus provided. In practice the difficulty need hardly be greater. Cases of permissible seizure might consequently be readily separated from those in which seizure is unwarrantable, could usage be set altogether aside. This however cannot with propriety be done. The policy of nations has, it is true, been governed by no principles; the wish to keep open a foreign market has generally been a motive quite as powerful as the hope of embarrassing an enemy; practice is thoroughly confused. Still practice cannot be devoid of authority, and it must be subjected to analysis in a spirit of willingness to give due value to any custom that may appear to have fairly established itself. On the other hand, in view of the exceptional confusion and arbitrariness by which practice is marked, it may reasonably be regarded as of secondary value, and appeal may in the first instance be made to principle. If an inquiry into the due range of contraband be conducted in this manner, it will be possible to classify broadly articles other than munitions of war according to the greater or less intimacy of their association with warlike operations, and consequently, according to the less or greater urgency or peculiarity of circumstance under which a belligerent may fairly prevent their access to his enemy.

Hall, p. 682.

**Clothing, money and metals.**

Money and unwrought metals, and in general, clothing and its materials, are of like character with provisions, and in principle may become contraband under similar conditions; but under modern conditions it would very rarely be necessary to consign money directly to an army or fleet in a neutral vessel; \* \* \*

Hall, p. 690.

**Coal.**

Coal, owing to the lateness of the date of which it has become of importance in war, is the subject of a very limited usage. In 1859 and 1870 France declared it not to be contraband; and according to M. Calvo the greater number of the secondary states have pronounced themselves in a like sense. England on the other hand, during the war of 1870, considered that the character of coal should be determined by its destination, and though she refuses to class it, as a general rule, with contraband merchandise, vessels were prohibited from sailing from English ports with supplies directly consigned to the French fleet in the North Sea. Germany went further, and remonstrated strongly against its export to France being permitted by the English government. The claim was extravagant, but the nation which made it is not likely to exclude coal from its list of contraband. More recently, during the West African Conference of 1884, Russia took occasion to dissent vigorously from the inclusion of coal amongst articles contraband of war, and declared that she would "categorically refuse her consent to any articles in any treaty, convention, or instrument whatever which would imply its recognition" as such.

The view taken by England is unquestionably that which is most appropriate to the uses of the commodity with which it deals. Coal is employed so largely, and for so great a number of innocent purposes, the whole daily life of many nations is so dependent on it by its use for making gas, for driving locomotives, and for the conduct of the most ordinary industries, that no sufficient presumption of an intended warlike use is afforded by the simple fact of its destination to a belligerent port. But on the other hand, it is in the highest degree noxious when employed for certain purposes; and when its destination to such purposes can be shown to be extremely probable, as by its consignment to a port of naval equipment, or to a naval station, such as Bermuda, or to a place used as a port of call, or as a base of naval operations, it is difficult to see any reason for sparing it which would not apply to gunpowder. One article is as essential a condition of naval offence as is the other. As will be seen directly, France has endeavoured within the last few years to treat as contraband an article so much more innocent in the circumstances than coal could be, that she at least must be regarded as estopped from further alleging its total exemption.

Hall, pp. 685-687; Calvo, sec. 2460; Bluntschli, sec. 805; Hansard, 3d series, vol. ccii, 1094, and vol. clxii, 2087; State Papers, Franco-German War, 1870, No. 3; Parl. Papers, Africa, No. iv, 1885, 132; British Admiralty Manual of Prize Law (1888), p. 20.

**Practice of Nations respecting foodstuffs.**

The doctrine of the English courts at the commencement of the present century with respect to provisions was that "generally they were not contraband, but might become so in circumstances arising out of the particular situation of the war, or the conditions of the parties engaged in it." Grain, biscuit, cheese, and even wine, when on their way to a port of naval equipment or to a naval armament, were condemned, and, as has already been seen, the same practice was followed by the courts of the United States. In 1793 and 1795, the English government indefensibly extended the application of the doctrine to the point of seizing all vessels laden with provisions which were bound to a French port, alleging as their justification that there was a prospect of reducing the enemy by famine. A serious disagreement occurred in consequence with the United States, which maintained that provisions could only be treated as contraband when destined for a place actually invested or blockaded; and the point remained wholly unsettled by the Treaty of 1794, which, while recognizing that provisions, under the existing law of nations, were capable of acquiring the taint of contraband, did not define the circumstances under which the case would arise. The excesses of the English government cast discredit on the doctrine under the shelter of which they screened themselves. Manning adopts it, but not without evident hesitation. Wheaton seems to think that provisions can only be contraband when sent to ports actually besieged or blockaded; and MM. Ortolan, Bluntschli, and Calvo declare this to be undoubtedly the case. Until lately no nation except England had pushed its practice even to the point admitted in the American courts, and England itself had long regarded its own doctrine of 1793 as wholly untenable; but in 1885 the doctrine was revived to its fullest extent by a country which has been in the habit of including a very narrow range of articles in its list of contraband. France, during her hostilities of that year with China, declared shipments of rice destined for any port north of Canton to be contraband of war. The pretension was resisted by Great Britain on the ground that though, in particular circumstances, provisions may acquire a contraband character they cannot be in general so treated. In answer the French government alleged that a special circumstance of such kind as to justify its action was supplied by the fact of "the importance of rice in the feeding of the Chinese population" as well as of the Chinese armies. Thus they implicitly claimed that articles become contraband, not by their importance in military or naval operations, but by the degree in which interference with their supply will put stress upon the noncombatant population. Lord Granville notified that Great Britain would not consider itself bound by the decision of any Prize Court which should give effect to the doctrine put forward by France; but no opportunity was afforded for learning whether the French Courts would have upheld the views of their government, as no seizure was made during the short remainder of the war; shipments of rice, it would seem, were entirely stopped by fear of capture.

Hall, pp. 687, 688; *The Jonge Margaretha*, 1. Rob., 193; *The Ranger*, 6 Rob., 125; *The Edward*, 6 Rob., 69; De Martens, rec. 5, 674; Wheaton, Elem., pt. iv, chap. iii, sec. 24; Ortolan, Dip. de la Mer, ii, 191 and 216; Bluntschli, sec. 807; Calvo, sec. 2452; Parl. Papers, France, No. 1, 1885.



**Foodstuffs.**

The topic of the admissibility of provisions in general to the list of contraband of war may be put aside as one which is not open to serious argument. Further than this, it cannot be doubted for a moment, not only that the detention of provisions bound even to a port of naval equipment is unauthorized by usage, but that it is unjustifiable in theory. To divert food from a large population, when no immediate military end is to be served, because it may possibly be intended to form a portion of supplies which in almost every case an army or a squadron could complete from elsewhere with little inconvenience, would be to put a stop to all neutral trade in innocent articles. But writers have been satisfied with a broad statement of principle, and they have overlooked an exceptional and no doubt rare case, in which, as it would seem, provisions may fairly be detained or confiscated. If supplies are consigned directly to an enemy's fleet, or if they are sent to a port where the fleet is lying, they being in the latter case such as would be required by ships, and not ordinary articles of import into the port of consignment, their capture produces an analogous effect to that of commissariat trains in the rear of an army. Detention of provisions is almost always unjustifiable, simply because no certainty can be arrived at as to the use which will be made of them; so soon as certainty is in fact established, they, and everything else which directly and to an important degree contributes to make an armed force mobile, become rightly liable to seizure. They are not less noxious than arms; but except in a particular juncture of circumstances their noxiousness cannot be proved.

Hall, pp. 689, 690.

**Ships.**

It may here be mentioned once for all that although the terms used with reference to contraband in public documents, by authors or in these pages, often seem to contemplate only things carried in ships, which of course present the commonest case, ships themselves, when suitable for any warlike use and on their voyage with a view to sale in a hostile port or for delivery to the enemy, fall under the same principles and are contraband. No one contests this, and in the British view, to be developed later, they are absolute contraband.

Westlake, vol. 2, p. 277.

**British and United States view.**

The view of contraband which found one of its earliest expressions in the treaty of Whitehall [between England and Sweden, 1661] may, from the state most eminent among its authors and upholders, be called the British view. Its most remarkable features are, first, the assertion of a class of conditional or occasional contraband, or contraband of circumstance, never including any thing solely of peaceful use, but in which things of use both in peace and in war, on their way to a hostile destination, may be placed as occasion requires, being otherwise entirely free; secondly, a milder treatment, by way of preemption, in certain cases roughly corresponding to that class. Goods *usus ancipitis* may be contraband of the conditional class either by virtue of an express declaration by the belligerent government, based on the circumstances of the war, or by the judg-

ment of its prize court, when that court sees reason for believing or presuming that they are intended to be used for purposes of war. The Admiralty *Manual* of 1888, embodying the British practice, declares that such a "presumption arises when the hostile destination of the vessel [carrying the goods] is either the enemy's fleet at sea, or a hostile port used exclusively or mainly for naval or military equipment." \* \* \*

The United States maintain the British view on contraband, which they inherited.

Westlake, vol. 2, pp. 282, 283.

The school of thought whose view on contraband was embodied in the treaty of the Pyrenees [between France and Spain, 1659] objects to conditional contraband as opening a door to arbitrary behaviour on the part of belligerent governments and their prize courts, and declines to see an alleviation in bringing in neutral cargoes for preemption only, which in practice can scarcely fail to cause some molestation to neutral commerce, and in theory conflicts with the view that a neutral ought not to be touched at all when his innocence is admitted by not condemning him. In the treaties concluded under the influence of that school the enumerations of contraband have often included articles *usus ancipitis*, which were thereby exposed to confiscation when under the British system they would have escaped with preemption. And states which take this line, having deprived themselves of a class of conditional contraband in which to place branches of neutral commerce only occasionally in conflict with their belligerent interest, have been the more impelled to save that interest by excessive extensions of absolute contraband. Thus France in 1885, in spite of her traditional policy as to victuals, declared rice destined for any Chinese port north of Canton to be contraband of war, and justified herself, in answer to the British remonstrance, by the importance of rice in feeding the Chinese population as well as the Chinese armies. Thus also Russia, which up to the time of her war with Japan did not admit conditional contraband, and which during the African conference at Berlin declared that she would refuse her consent to any inclusion of coal among contraband, issued at the commencement of that war a list of contraband including rice, provisions, horses, and "every kind of fuel, such as coal, naphtha, alcohol and other similar materials." Afterwards however, in deference to the protests of Great Britain and the United States, she consented that rice and provisions should be regarded only as conditionally contraband, according to the use to which they were to be applied.

Westlake, vol. 2, pp. 285, 286; Parliamentary Papers, France No. 1, 1885; Russian Regulations of February 28, 1904, in the London Gazette of March 11, 1904; Lord Lansdowne's letter of November 2, 1904, to the London Chamber of Commerce in the London Times, November 4, 1904.

The Institute of International Law has taken a line not entirely in accordance with either of the schools thus far criticised. In 1895 a commission adopted a resolution approving conditional contraband when resulting from an immediate and special destination to the military or naval forces or the military operations of the enemy, and declared in advance by the belligerent government. But in 1896 the

Institute as a whole substituted an emphatic condemnation of conditional contraband, at the same time proposing for a belligerent a right of sequestration or preemption, at his pleasure and subject to an equitable indemnity, over all goods, being on their way to a port of his enemy, which can serve equally for warlike or peaceful uses. The change was made in spite of strong opposition from the late Dr. Perels, who held an eminent position in international law both from his talents and from his being a director in the German Ministry of Marine. And we are thus entitled to say that if the doctrine which had its origin in France has become widely spread, at least it cannot claim to be regarded as that of the whole continent.

Westlake, vol. 2, p. 286; *Annuaire*, vols. 13, 14, 15.

The treaties in which contraband of war is mentioned, except the great ones which launched the subject, present little interest except for ascertaining by what engagements each state is actually bound. Stipulations on contraband, like all political stipulations, are not extended beyond the original parties by a most favoured nation clause. Like all stipulations as to the rights of neutrals which do not take the form of declarations of law, such as the Declaration of Paris, they are cancelled by war between the parties. Even while they endure they have no effect unless one party is a belligerent and the other a neutral, and so many European wars have been general ones as seriously to affect the number of cases in which that situation has existed. Whether these facts have led to their being rather carelessly entered into or from any other causes, the mind of England on the subject of contraband would be erroneously judged if her treaties during a century and a half were taken as showing it. What that mind really was is shown by her practice so far as she was free, and by her resistance to the Armed Neutralities. In fact England adopted the system of the treaty of the Pyrenees, sometimes with slight variations, in treaties of 1667 with Spain and Holland, and of 1677 with France—instances which are remarkable for coming so soon after the Anglo-Swedish treaty of 1661 of opposite character—and again in treaties of 1713 and 1786 with France. Nor were these the only instances, and Hall, speaking of the eighteenth century, says that treaties embodying the French doctrine of contraband bound England at different times with France, Spain, Sweden, Russia, Denmark and the United States. The fact goes far to undermine the reliance placed by many jurists on treaties, as testimony to a public conviction on litigated points of international law.

Westlake, vol. 2, pp. 286, 287.

Grotius divided commodities into three classes: things useful for war only, things useless for warlike purposes, and things useful in war and peace indifferently. The first might always be captured when on their way to an enemy, the second never, and with regard to the third, *res ancipitis usus*, the circumstances of the contest were to be considered. This classification is valuable, and contains, in its reference to surrounding circumstances as the decisive factors in dealing with the third class, the germ of the English doctrine of conditional or occasional contraband.

Lawrence, p. 703.

### Foodstuffs and fuel.

In more recent years the chief battles took place over provisions and coals. Russia excluded foodstuffs from her list of contraband published in 1900. With regard to coal she followed France in maintaining the extreme view that it could in no case be regarded as contraband. Yet soon after the outbreak of her war with Japan in 1904 she declared both provisions and fuel to be unconditionally contraband, though afterwards, under strong pressure from Great Britain and the United States, she modified her position with regard to articles of food.

Lawrence, pp. 704, 705.

In order to establish the doctrine of conditional contraband it is not necessary to show that every rule of the English prize courts is correct. Harsh decisions may have been given from time to time. The conclusion that the captured goods were really destined for warlike use may have been reached in many cases on the strength of presumptions insufficient to bear the weight of the superstructure reared upon them. All this may be admitted; and yet the fact remains that, by consent so general as to be almost universal there are circumstances which will justify the seizure and condemnation as contraband of goods which are ordinarily innocent. Provisions are an excellent example. As a rule they are not captured; but if they are stopped on their way to an enemy's force, or a besieged place, they are taken without hesitation or scruple. The vast majority of publicists recognize the legality of such seizure, though some would impose a duty of compensation on the captor state. They thus admit in effect the proposition that what is not contraband at one time and under one set of conditions is contraband at another time and under another set of conditions. When this is allowed, the doctrine of conditional contraband is granted, and nothing remains but to settle its application. But it is just at this point that difficulties that till lately proved insuperable arose. Great Britain placed many articles *ancipitis usus* in her list of goods absolutely contraband. Naval stores supply a case in point. Masts and spars, boiler-plates and screw-propellers, are needed by peaceful merchantmen as well as by armed cruisers. Yet the Admiralty manual classed them with arms and ammunition, and ordered their capture if bound to a hostile port, a rule which naturally enough found no favor in the eyes of continental publicists.

While such differences as these existed they were a danger to the peace of the civilized world. By the end of the nineteenth century it was felt that polemical discussion could do no further good. In the course of it a possibility of approximation had been revealed. It seemed evident that international agreement might be reached by way of a frank acceptance of the British and American doctrine of conditional contraband, in return for the transfer to the conditionally contraband class of many articles now deemed absolutely contraband by Great Britain. If these mutual concessions were once made, no insuperable difficulty would be presented by the further task of deciding what circumstances connected with the destination of the vessel and the special needs of the enemy should be deemed sufficient to support the presumption that the goods were destined for an essentially warlike use, and were therefore fit subjects of belligerent capture. Thus two lists would come into existence, not at the dictation

of belligerents anxious to make the utmost use of their naval power, or neutrals jealous of any interference with a lucrative commerce, but as the result of full discussion carried on with the view of arriving at conclusions just to all. The first list would consist of those things which were contraband in their own nature, and therefore liable to seizure and condemnation if found on their voyage to an enemy destination. The second list would include all other articles capable of military use; but they would not be deemed contraband of war unless it was clear they were about to be employed for warlike purposes, and were not destined to supply the needs of a peaceful population.

Acting on these views the Hague Conference of 1907 made a persistent attempt to throw the law of contraband into the form of rules which would command general assent. It succeeded to the extent of drawing up a list of articles absolutely contraband; but it failed to agree on a corresponding list of articles conditionally contraband, and was obliged to give up its task. Its labors were, however, of the greatest service to the Naval Conference of 1908-1909, which adopted without alteration its predecessor's list of absolute contraband, and added to it two others, the first containing goods conditionally contraband and the second goods which may not be declared contraband at all. These are so important that we will give them at full length. They are not perfect; but they represent a pacific termination of age-long disputes and afford a firm base for future advances.

Lawrence, pp. 708-710; Holland, *Manual of Naval Prize Law*, p. 19; Deuxième Conférence Internationale de la Paix, *Acts et Documents*, Vol. III, p. 1114.

But in addition to these there were other large classes of goods which varied in character. They could not be condemned merely for being what they were. It was necessary to know more about them than their nature and description. All manner of collateral circumstances must be taken into account. Whatever raised a presumption that they would be used for warlike purposes told against them. Whatever tended to show that they would be consumed by peaceful non-combatants told in their favor. It is for this reason that they were called goods conditionally contraband. Among them were provisions, money, coals, horses, and in recent times materials for the construction of railways and telegraphs. It is obvious that the noxious or innocuous character of such things as these depended on the use to which they were applied. Great Britain contended that they might lawfully suffer capture and condemnation when surrounding circumstances make it reasonably clear that they would be used for purposes of warfare. The immediate destination of the goods was held to be the best, though not the only, test of their final use. In the case of the *Yonge Margaretha*, Lord Stowell condemned a cargo of cheeses bound for Brest, a port of naval equipment, the cheeses being such as were used in the French navy. Should the voyage be intended to terminate at the enemy's fleet, or at a place where a portion of his army was encamped, there could be no doubt that condemnation would follow capture. The views thus expressed were spoken of collectively as the doctrine of conditional contraband.

Lawrence, p. 706; I. C. Rob., 194.

### Views of continental publicists.

This doctrine [of conditional contraband] was strongly opposed by most of the publicists of the European continent. One of the most recent of them, M. Richard Kleen, in a work published in 1893, examined the English decisions and pronounced against their validity. He held nothing to be contraband but objects expressly made for war and fitted for immediate employment in warlike operations. These objects in their completed form, or in parts which can be fitted together without a further process of alteration or manufacture, were liable to capture if found on their journey to an enemy destination. But he added that articles which do not come under these categories can never under any circumstances become lawful prize as contraband of war. He combated with much vigor the views set forth in the *Manual of Naval Prize Law* drawn up in 1888 by Professor Holland for the British Admiralty, and declined to accept proof of the likelihood of hostile use as a sufficient reason for the seizure of goods capable in their own nature of innocent employment. Other continental writers, while questioning the validity of the doctrine of occasional contraband, make admissions which involved its principle. Bluntschli, for instance, declared that such things as engines, horses, and coal might be accounted contraband if it could be shown that they were destined for a warlike use. Heffter ranked them among prohibited goods when their transport to a belligerent by a neutral afforded assistance manifestly hostile in its nature. Ortolan maintained that *res ancipitis usus* might be treated as contraband in very exceptional cases; but he excepted from this exception provisions and other objects of first necessity. Klüber admitted the existence of doubtful cases, which must be ruled by surrounding circumstances. As late as 1896 the Institute of International Law first condemned unequivocally the theory of conditional or relative contraband, and then declared that a belligerent might seize on payment of an equitable indemnity "those articles which, being on their way to a port of his adversary, could serve equally for warlike and peaceful purposes."

These opinions conceded all that is essential in the British position.

Lawrence, pp. 706-708; Kleen, *Contrabande de Guerre*, pp. 19-37; *Droit International Codifié*, sec. 805; *Droit International*, sec. 160; *Diplomatie de la Mer*, Vol. II, p. 179; *Droit des Gens Moderne de l'Europe*, sec. 288; *Annuaire de l'Institut de Droit International*, 1896, p. 231.

There are many articles which are not by their character destined to be made use of in war, but which are nevertheless of great value to belligerents for the continuance of war. Such articles are conditionally contraband, which means that they are contraband when it is clearly apparent—see below, sec. 395—that they are intended to be made use of for military or naval purposes. This intention becomes apparent on considering either the destination of the vessel carrying the articles concerned, or the consignee of the articles.

Before the Declaration of London neither the practice of States nor the opinion of writers agreed upon the matter, and it was in especial controversial whether or no foodstuffs, horses and other beasts of burden, coal and other fuel, money and the like, and cotton could conditionally be declared contraband.

Oppenheim, vol. 2, pp. 485-486.

**Foodstuffs.**

That *foodstuffs* should not under ordinary circumstances be declared contraband there ought to be no doubt. There are even several writers who emphatically deny that foodstuffs could ever be conditional contraband. But the majority of writers has always admitted that foodstuffs destined for the use of the enemy army or navy might be declared contraband. This has been the practice of Great Britain, the United States of America, and Japan. But in 1885, during her hostilities against China, France declared rice in general as contraband, on the ground of the importance of this article to the Chinese population. And Russia in 1904, during the Russo-Japanese war, declared rice and provisions in general as contraband; on the protest of Great Britain and the United States of America, however, she altered her decision and declared these articles conditional contraband only.

Oppenheim, vol. 2, p. 486.

**Money, metals and securities.**

As regards *money*, unwrought precious metals which may be coined into money, bonds and the like, the mere fact that a neutral is prohibited by his duty of impartiality from granting a loan to a belligerent ought to bring conviction that these articles are contraband if destined for the enemy State or its forces. However, the case seldom happens that these articles are brought by neutral vessels to belligerent ports, since under the modern conditions of trade belligerents can be supplied in other ways with the necessary funds.

Oppenheim, vol. 2, p. 487.

**Fuel.**

Since men-of-war are nowadays propelled by steam power, the importance of *coal*, and eventually other fuel for waging war at sea is obvious. For this reason, Great Britain has ever since 1854 maintained that coal, if destined for belligerent men-of-war or belligerent naval ports, is contraband. But in 1859 France and Italy did not take up the same standpoint. Russia, although in 1885 she declared that she would never consent to coal being regarded as contraband, in 1904 declared coal, naphtha, alcohol, and every other kind of fuel, absolute contraband. And she adhered to this standpoint, although she was made to recognise the distinction between absolute and conditional contraband.

Oppenheim, vol. 2, p. 487.

According to the British practice which has hitherto prevailed—see Holland, *Prize law*, Sec. 64—the list of conditional contraband comprises: Provisions and liquors for the consumption of army and navy; money, telegraphic materials, such as wire, porous cups, platina, sulphuric acid, and zinc; materials for the construction of a railway, as iron bars, sleepers, and the like; coal, hay, horses, rosin, tallow, timber. But it always was in the prerogative of the Crown to extend or reduce this list during a war according to the requirements of the circumstances.

Oppenheim, vol. 2, p. 488 (note).

This list [of Article 24] represents a compromise, just as does the list of absolute contraband of article 22. Those opponents of the Declaration of London who object to foodstuffs being on the list of conditional contraband forget that several times in the past \* \* \* belligerents have declared foodstuffs absolute contraband.

Oppenheim, vol. 2, p. 489.

#### **Ships.**

A neutral vessel, whether carrying contraband or not, can herself be contraband. Such is the case when she has been built or fitted out for use in war and is on her way to the enemy. Although it is the duty of neutrals \* \* \* to employ the means at their disposal to prevent the fitting out, arming, or the departure of any vessel within their jurisdiction, which they have reason to believe is intended to cruise or to engage in hostile operations against a belligerent, their duty of impartiality does not compel them to prevent their subjects from supplying a belligerent with vessels fit for use in war except where the vessel concerned has been built or fitted out by order of a belligerent. Subjects of neutrals may therefore—unless prevented from so doing by Municipal Law, as, for instance, subjects of the British Crown by Secs. 8 and 9 of the Foreign Enlistment Act, 1870—by way of trade supply belligerents with vessels of any kind, provided these vessels have not been built or fitted out by order of the belligerent concerned. According to the practice which has hitherto prevailed, such vessels, being equivalent to arms, used to be considered as absolute contraband. And it made no difference whether or no they were fit for use as men-of-war, it sufficed that they were fit to be used for the transport of troops and the like.

Oppenheim, vol. 2, p. 494; Twiss, *The Law of Nations*, II, sec. 148; Holland, *Prize Law*, sec. 86.

It is part of the prerogative of the Crown during the war to extend or reduce the lists of Articles to be held \* \* \* Conditionally Contraband, subject, however, to any Treaty Engagements binding upon Great Britain.

Holland, p. 21.

#### **British list.**

The list of Goods Conditionally Contraband comprises:—Provisions and Liquors fit for the consumption of Army or Navy (*Jonge Margaretha*, 1 C. Rob. 191. *Haabet*, 2 C. Rob. 174. *Edwards*, 4 C. Rob. 68. *Ranger*, 6 C. Rob. 125). Money. Telegraphic Materials, such as Wire, Porous Cups, Platina, Sulphuric Acid, and Zinc (see *Parliamentary Papers*, North America, No. 14, 1863, p. 5). Materials for the construction of a Railway, as Iron Bars, Sleepers, &c. Coals (see Lord Kingsdown's Speech in the House of Lords, May 26, 1861). Hay. Horses. Rosin (*Nostra Signora de Begona*, 5 C. Rob. 98). Tallow (*Neptunus*, 3 C. Rob. 108). Timber (*Twende Brodre*, 4 C. Rob. 33).

Holland, p. 20.

#### **List of conditional contraband proclaimed by the United States in 1898.**

Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined



for the enemy's forces; provisions, when destined for an enemy's ship or ships, or for a place that is besieged.

Proclamation and Decrees of Neutrality (U. S. State Department publication), p. 88.

The term "contraband of war" includes only articles having a belligerent destination and purpose. Such articles are classed under two general heads:

(2) Articles that may be and are used for purposes of war or of peace, according to circumstances.

U. S. Naval War Code, 1900, Article 34.

Until otherwise announced, the following articles are to be treated as contraband of war:

\* \* \* \* \*  
*Conditionally contraband.*—Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy's forces; provisions, when actually destined for the enemy's military or naval forces.

U. S. Naval War Code, 1900, Article 36.

The following articles will be held to be contraband of war only when they are destined for the enemy army or navy, or when they may, from the circumstances of their place of destination, be regarded as intended for the use of the army or navy on reaching enemy territory:

Provisions and beverages, clothing and materials for making clothing, horses, saddlery, fodder, vehicles, coal and other fuel, timber, coins, gold or silver bullion, and materials for the construction of telegraphs, telephones, and railways.

Japanese Regulations 1904, Article 14.

As contraband of war, without necessity for being so declared, will be regarded the following which are capable of use for war as well as for peace purposes, under the designation of articles and materials conditionally contraband.

1. Food.
2. Forage and grain suitable for animals feed.
3. Articles of clothing, cloth, and footwear suitable for military purposes.
4. Gold and silver, minted or in bars, and paper money as well.
5. Vehicles of any kind suitable for use in war and their parts.
6. Ships, boats, and vessels of any kind, floating docks and equipment for dry docks and their parts.
7. Fixed or rolling railways material, telegraph, radio and telephone material.
8. Airships and flying machines, their recognised constituent parts, as well as accessories, articles and material which can be recognized as of use for aeronautic and aviation purposes.
9. Fuel and lubricants.
10. Powder and explosives which are not expressly intended for war purposes.
11. Barbed wire and tools for fixing it in place and cutting it.

12. Horseshoes and farriers equipment.

13. Harness and saddles.

14. Binoculars, telescopes, chronometers, and all kinds of nautical instruments.

As "food" shall be considered all material, solid and liquid, serving as food for human beings; the expression "paper money" includes banknotes, but not bills, bills of exchange, nor checks; boilers and machinery come under No. 6 of the list; all "fixed railway material" includes among other things, rails, ties, turntables, bridge parts.

Conditional contraband also are those articles expressly so declared by the German Empire.

The declarations referred to in 22 and 24 will be communicated to allied and neutral governments and to the captains of H. M. ships.

German Prize Rules, 1909, Articles 23-25.

You will consider as contraband of war, without notice, the following articles and materials which, susceptible of use in war as well as for purposes of peace, are included under the name of conditional contraband, and the hostile destination of which appears as set forth further on, to wit:

[The list which follows is identical with that contained in Article 24, Declaration of London.]

French Naval Instructions 1912, sec. 35.

When circumstances require you will receive a supplementary list of articles and materials susceptible of use in war and also for peaceful purposes which the government deems advisable during hostilities to add to the articles of conditional contraband above enumerated.

French Naval Instructions 1912, sec. 36.

Articles 24 and 25, Declaration of London, are substantially identical with sections 51, 52, respectively, Austro-Hungarian Manual, 1913.

#### **Foodstuffs.**

"In one of your letters of March 13 you express your apprehensions that some of the belligerent powers may stop our vessels going with grain to the ports of their enemies, and ask instructions which may meet the question in various points of view, intending, however, in the meantime to contend for the amplest freedom of neutral nations. Your intention in this is perfectly proper, and coincides with the ideas of our own Government in the particular case you put, as in general cases. Such stoppage to an unblockaded port would be so unequivocal an infringement of the neutral rights that we can not conceive it will be attempted."

Mr. Jefferson, Secretary of State, to Mr. Pinckney, minister to England, May 7, 1793, MS. Inst. United States Ministers, 1, 278.

#### **Foodstuffs.**

The United States, on the other hand, speaking through Mr. Jefferson, Secretary of State, declared that the position that provisions were contraband "in the case where the depriving an enemy of these

supplies, is one of the means *intended to be employed* for reducing him to reasonable terms of peace," or in any case but that of a place *actually blockaded*, was "entirely new;" that reason and usage had established "that, when two nations go to war, those who choose to live in peace retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, as usual; to go and come freely, without injury or molestation; and, in short, that the war among others shall be, for them, as if it did not exist." To these mutual rights nations had allowed one exception—that of furnishing implements of war to the belligerents, or anything whatever to a blockaded place. Implements of war destined to a belligerent were treated as contraband, and were subject to seizure and confiscation. Corn, flour, and meal were not of the class of contraband, and consequently remained articles of free commerce. The state of war between Great Britain and France furnished neither belligerent with the right to interrupt the agriculture of the United States, or the peaceable exchange of its produce with all nations. Such an act of interference tended directly to draw the United States from the state of peace in which they wished to remain. If the United States permitted corn to be sent to Great Britain and her friends, and refused it to France, such an act of partiality might lead to war with the latter power. If they withheld supplies of provisions from France, they should in like manner be bound to withhold them from her enemies also, and thus to close to themselves all the ports of Europe where corn was in demand, or else make themselves a party to the war. This was a dilemma into which no pretext for forcing the United States could be found. Great Britain might, indeed, "feel the desire of starving an enemy nation; but she can have no right of doing it at our loss, nor of making us the instrument of it."

Moore's Digest, vol. vii, pp. 677, 678; Mr. Jefferson, Secretary of State, to Mr. Pinckney, minister to England, September 7, 1793, Am. State Papers, For. Rel. 1, 239.

### Fuel.

"The discussion which at this time is going on respecting the military character of coal, and whether it is now excluded from general commerce as contraband of war is a striking illustration of the tendency to enlarge this power of prohibition and seizure, and of the necessity of watching its exercise with unabated vigilance. Here is an article, not exclusively nor even principally used in war, but which enters into general consumption in the arts of peace, to which, indeed, it is now vitally necessary. It has become also important in commercial navigation. It is a product of nature with which some regions are bountifully supplied while others are destitute of it, and its transportation, instead of meeting with impediments, should be aided and encouraged. The attempt to enable belligerent nations to prevent all trade in this most valuable accessory to mechanical power has no just claim for support in the law of nations; and the United States avow their determination to oppose it as far as their vessels are concerned."

Mr. Cass, Secretary of State, to Mr. Mason, minister to France, No. 190, June 27, 1850, MS. Inst. France, XV, 426, Moore's Digest, vol. vii, p. 673.

**Money and metals.**

Referring to a circular of the Department of State, No. 12, May 12, 1862, transmitting a proclamation of the President relaxing the blockade of certain ports, together with regulations as to trade with such ports; and also to circular No. 13, May 30, 1862, transmitting additional regulations, "together with a list of certain articles contraband of war, of which the importation was prohibited into ports the blockade of which had been relaxed by the President," Mr. Seward, April 26, 1864, instructed the diplomatic and consular officers of the United States that, in the opinion of the Secretary of the Treasury, considerations of a public nature required that the importation of coin or bullion from foreign countries into such ports should be entirely prohibited; and they were accordingly directed to add to the prohibited articles enumerated in circular No. 13 the words "coin" and "bullion."

Moore's Digest, vol. vii, p. 662; Mr. Seward, Secretary of State, to the diplomatic and consular officers of the United States, circular No. 50, April 26, 1864, MS. Circular, I, 267.

**Money.**

Early in June, 1898, the American ambassador at Paris reported that Spain had applied to France for the use of her mint for coining silver pieces, and that the French minister of foreign affairs, before acceding to the request, desired to learn whether the United States would take exception to such a transaction. It appears that the French mint is a Government institution, but that it is used by various small states for their coinage, and it was surmised, in case the desired permission should be refused to Spain, the work would be done in Belgium, where the mint is a private institution. The Secretary of State communicated with the Secretary of the Treasury on the subject, and, in so doing, suggested that the inquiry of France might have been prompted by the circumstance that money may, under certain conditions, be treated as contraband; but before any conclusion was reached the American ambassador reported that other arrangements had been made by Spain, and that the coinage would not be done by the French mint.

Moore's Digest, vol. vii, p. 868; Mr. Porter, Ambassador to France, to Mr. Day, Secretary of State, June 7, 1898; Mr. Day to Secretary of Treasury, June 7, 1898; Mr. Porter to Mr. Day, June 11, 1898.

**Foodstuffs.**

"His Majesty's Government do not contest that, in particular circumstances, provisions may acquire a contraband character, as for instance, if they should be consigned direct to the army or fleet of a belligerent, or to a port where such fleet may be lying, and if facts should exist raising the presumption that they are about to be employed in victualling the fleet of the enemy. In such cases it is not denied that the other belligerent would be entitled to seize the provisions as contraband of war, on the ground that they would afford material assistance towards the carrying on of warlike operations.

His Majesty's Government could not, however, admit that if such provisions were consigned to the port of a belligerent (even though it should be a port of naval equipment) they should therefore be necessarily regarded as contraband of war.

In the view of His Majesty's Government the test appears to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use.

His Majesty's Government desire to point out that the decision of the Prize Court of the captor in such matters, in order to be binding on neutral States, must be in accordance with recognised rules and principles of international law.

His Majesty's Government feel themselves bound to reserve their rights by protesting against the doctrine that it is for the belligerent to decide that certain articles, or classes of articles, are as a matter of course, and without reference to the considerations referred to in the earlier portion of this despatch, to be dealt with as contraband of war regardless of the well-established rights of neutrals; and His Majesty's Government could not consider themselves bound to recognise as valid the decision of any Prize Court which violated those rights, or was otherwise not in conformity with the recognised principles of international law.

Your Excellency will read this despatch to Count Lamsdorff and furnish him with a copy."

I am, &c.

(Signed) LANSDOWNE.

The Marquess of Lansdowne to Sir C. Hardinge. British Ambassador to Russia, June 1, 1904.

#### Fuel.

"The new doctrine, which is in complete contradiction to the law and practice of nations sanctioned by international usage, and which is entirely contrary to the former views of the Russian Government, viz., that coal and fuel of every kind are contraband, irrespective of their destination, and that the seizure of cargoes, or the vessels containing them, upon the ground that they included such articles is justifiable in international law, is one which it is impossible for His Majesty's Government to admit. It has been suggested to me by your Excellency that in view of the fact that Russian war-ships proceeding to the Far East are not allowed to purchase coal in British ports, it could hardly be claimed that British merchant-vessels should have the right to carry coal to the ports of the enemy, even if it is not destined for war-like purposes. The reply to this suggestion is obvious. An article of commerce may be so essential for hostile purposes that no war-ship should be supplied with it in neutral waters, and yet so essential for the ordinary purposes of civil life that it should not be prevented from reaching the peaceful inhabitants of belligerent countries. The dual character of coal as contraband of war forms a very apt illustration of the above.

There is another aspect of this question to which I would invite your Excellency's attention. From the enormous quantities of coal which arrive daily in Russia from Great Britain, for both peaceful and warlike purposes, it is evident that the British trade in coal is of very great importance. It is equally certain that the importance of this trade is not confined to exports to Russia, and that very large exports of coal to Japan, for purposes both of peace and war, take place. Your Excellency will, I am confident, admit that the fact of

the Governments of Russia and Japan being at war is not in itself a sufficient reason why the peaceful commerce between Great Britain and commercial houses in Japan should be treated with such severity as to render commerce both dangerous and even prohibitive."

Sir C. Hardinge, British ambassador to Russia to Count Lamsdorff, Russian Foreign Minister, October 9, 1904.

#### **Fish products.**

*The "Thea," Russian and Japanese Prize Cases, vol. 1, p. 96.*—In this case the Russian Supreme Court held that fish products, not suitable for food, were not contraband of war.

#### **Kerosene oil.**

*The "Oldhamia," Russian and Japanese Prize Cases, vol. 1, p. 145.*—This was the case of a British vessel captured while on a voyage to Japan, with a cargo of kerosene, belonging to the Standard Oil Co. The manifest did not show any destination beyond Hong Kong, which port had already been passed, and there was no bill of lading on board. Moreover it was claimed by the captors that the vessel showed no lights and that the crew gave false evidence.

Held by the Russian Supreme Court that the kerosene was contraband as susceptible of use as fuel, in the absence of satisfactory proof of its innocent destination, and in view of the fact that the Japanese navy had used kerosene during the war for fire-ships.

#### **Canned fish.**

*The "Knight Commander," Russian and Japanese Prize Cases, vol. 2, p. 54.*—In this case the Supreme Prize Court, reversing the decision of the Libau Court, held that tinned salmon consigned to a Japanese trader was contraband, there being no evidence as to the purpose for which it was required.

WAIVER OF RIGHT TO TREAT AS CONTRABAND ARTICLE COMPRISED IN CLASS LISTED IN  
ARTICLE 22 OR 24, DECLARATION OF LONDON.

If a Power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Articles 22 and 24, such intention shall be announced by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.—*Declaration of London, Article 26.*

A belligerent may not wish to use the right to treat as contraband of war all the articles included in the above lists. It may suit him to add to conditional contraband an article included in absolute contraband or to declare free, so far as he is concerned, the trade in some article included in one class or the other. It is desirable that he should make known his intention on this subject, and he will probably do so in order to have the credit of the measure. If he does not do so, but confines himself to giving instructions to his cruisers, the vessels searched will be agreeably surprised if the searcher does not reproach them with carrying what they themselves consider contraband. Nothing can prevent a power from making such a declaration in time of peace. See what is said as regards article 23.

Report of committee which drafted Declaration of London.

**Explanation of rule.**

The power to add to lists carries with it the power to take from them or amend them. A state might declare that in the event of war it would not exercise its right to capture such and such goods in either of the lists, or it might pledge itself to treat as conditional contraband something which appeared in the list of absolute contraband. Neutrals could have no objection to receive more lenient treatment than was secured to them by strict law, and therefore the kind of alteration we are now contemplating is not likely to be challenged. All declarations of change, whether made in time of peace, or at the beginning of a war or during its continuance, as would usually be the case, must be notified to other powers, in order to give them an opportunity of raising objections if they wish and publishing the information for the benefit of their merchants and shippers.

Lawrence, p. 713. -

Article 26, Declaration of London, is substantially identical with section 53, Austro-Hungarian Manual, 1913.

CONTRABAND NOT TO INCLUDE ARTICLES USELESS IN WAR.

**Articles which are not susceptible of use in war may not be declared contraband of war.**—*Declaration of London, Article 27.*

The existence of a so-called free list (art. 28) makes it useful thus to put on record that articles which can not be used for purposes of war may not be declared contraband of war. It might have been thought that articles not included in that list might at least be declared conditional contraband.

Report of committee which drafted Declaration of London.

All other merchandise, and things not comprehended in the articles of contraband, explicitly enumerated and classified as above, shall be held and considered as free, and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by the citizens of both the contracting parties, even to places belonging to an enemy, excepting those places only which are at that time besieged or blockaded; and, to avoid all doubt in this particular, it is declared that those places only are besieged or blockaded which are actually attacked by a belligerent force capable of preventing the entry of the neutral.

Treaty of Peace, Amity, Navigation and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XVIII.

All other merchandise and things not comprehended in the articles of contraband explicitly enumerated and classified as above, shall be held and considered as free, and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by the citizens of both the contracting parties, even to places belonging to an enemy, excepting only those places which are at that time besieged or blockaded; and to avoid all doubt in this particular, it is declared that those places or ports only are besieged or blockaded which are actually attacked by a belligerent force capable of preventing the entry of the neutral.

Treaty of Peace, Friendship, Commerce and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XVIII.

Neutrals have the right to continue during war to trade with the belligerents, subject to the law relating to contraband and blockade. The existence of this right is universally admitted, although on certain occasions it has been in practice denied. Of those occasions the most memorable are the wars growing out of the French Revolution, and the Napoleonic wars that succeeded the breach of the peace of Amiens, when French decrees and British orders in council assumed to dictate the trade in which neutrals should be permitted to engage or to prohibit them from trading with belligerents altogether.

Moore's Digest, vol. vii. p. 382.



The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade.

Moore's Digest, vol. vii, p. 656.

If the Commander is satisfied that the Goods on board the Vessel are fit for purposes of peace exclusively, he should allow the Vessel to proceed on her course.

Holland, p. 21.

Articles and materials which can not be employed for war purposes can not be declared contraband of war.

German Prize Rules, 1909, Article 26.

Articles and materials which have not been included in the above two lists of absolute and conditional contraband or which have not been notified to you to be added thereto are not contraband of war.

French Naval Instructions, 1912, sec. 44.

Article 27, Declaration of London, is substantially identical with section 54, Austro-Hungarian Manual, 1913.

*The "Peterhoff," 5 Wall., 28.*—In this case the court said that articles exclusively used for peaceful purposes are not contraband.

LIST OF ARTICLES NOT TO BE DECLARED CONTRABAND.

The following may not be declared contraband of war:—

- (1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.
- (2) Oil seeds and nuts; copra.
- (3) Rubber, resins, gums, and lacs; hops.
- (4) Raw hides and horns, bones and ivory.
- (5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.
- (6) Metallic ores.
- (7) Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.
- (8) Chinaware and glass.
- (9) Paper and paper-making materials.
- (10) Soap, paint and colours, including articles exclusively used in their manufacture, and varnish.
- (11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.
- (12). Agricultural, mining, textile, and printing machinery.
- (13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral.
- (14) Clocks and watches, other than chronometers.
- (15) Fashion and fancy goods.
- (16) Feathers of all kinds, hairs, and bristles.
- (17) Articles of household furniture and decoration; office furniture and requisites.—*Declaration of London, Article 28.*

To lessen the drawbacks of war as regards neutral trade it has been thought useful to draw up this so-called free list, but this does not mean, as has been explained above, that all articles outside it might be declared contraband of war.

The ores here referred to are the product of mines from which metals are derived.

There was a demand that dyestuffs should be included in (10), but this seemed too general, for there are materials from which colors are derived, such as coal, which also have other uses. Products only used for making colors enjoy the exemption.

“Articles de Paris,” an expression the meaning of which is universally understood, come under (15).

(16) refers to the hair of certain animals, such as pigs and wild boars.

Carpets and mats come under household furniture and ornaments (17).

Report of committee which drafted Declaration of London.

These which follow shall not be reckoned in the number of prohibited goods, that is to say: All sorts of cloths, and all other manufactures of wool, flax, silk, cotton, or any other materials; all kinds of wearing apparel, together with the things of which they are commonly made; gold, silver coined or uncoined, brass, iron, lead, copper, latten, coals, wheat, barley, and all sorts of corn or pulse, tobacco; all kinds of spices, salted and smoked flesh, salted fish, cheese, butter, beer, oyl, wines, sugar; all sorts of salt and provisions which serve for the nourishment and sustenance of man; all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail-cloth, anchors, and any parts of anchors, ship-masts, planks, boards, beams, and all sorts of trees and other things proper for building or repairing ships. Nor shall any goods be considered as contraband which have not been worked into the form of any instrument or thing for the purpose of war by land or by sea, much less such as have been prepared or wrought up for any other use: all which shall be reckoned free goods, as likewise all others which are not comprehended and particularly mentioned in the foregoing article, so that they shall not by any pretended interpretation be comprehended among prohibited or contraband goods. On the contrary, they may be freely transported by the subjects of the King and of the United States, even to places belonging to an enemy, such places only excepted as are besieged, blocked, or invested; and those places only shall be considered as such which are nearly surrounded by one of the belligerent powers.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, Article X.

This free list [of Article 28] is of great importance to neutral trade, more particularly as it not only comprises such articles as are not susceptible of use in war, but likewise a number of articles, the possibility of the use of which in war is so remote as practically to make them not susceptible of use in war. The list guarantees to a number of industries and trades of neutral States freedom from interference on the part of belligerents, and it is to be expected that in time the list will be increased.

Oppenheim, vol. 2, p. 493.

The following articles cannot be declared contraband of war:—

1. Raw cotton, raw wool, raw silk, raw jute, raw flax, raw hemp, and other raw materials of textile industries, and also the yarn spun from them.
2. Oil bearing nuts and seeds; copra.
3. Caoutchouc, resin, rubber and gum, hops.
4. Rawhides, horns, bones and ivory.
5. Natural and manufactured fertilizers, including nitrate and phosphate suitable for agricultural purposes.
6. Ores.
7. Soil, clay, lime, chalk, stone, including marble, brick, slate, and roofing tiles.
8. Porcelain and glassware.
9. Paper and material prepared for its manufacture.
10. Soap, dye-stuff, including material exclusively intended for its manufacture, and varnish.

11. Chloride of lime, soda, caustic soda, sulphuric acid, sodic sulphate in cakes, ammonia, ammonia-sulphate and copper sulphate.
12. Machinery for agriculture, mining, textile industries, and book printing.
13. Precious stones, semi-precious stones, pearls, mother-of-pearl and corals.
14. Tower and wall clocks, clocks and watches, other than chronometers.
15. Fancy goods and jewelry.
16. Feathers of all kinds, hair and bristles.
17. Articles of household furnishings and decoration, office furniture and equipment.

German Prize Rules, 1909, Article 27.

The following articles are never contraband of war:

[The list which follows is identical with that contained in Article 28, Declaration of London.]

French Naval Instructions 1912, sec. 45.

Article 28, Declaration of London, is substantially identical with section 55, Austro-Hungarian Manual, 1913.

#### **Cotton, coal and other fuel.**

"We are informed that it is intended to treat raw cotton as contraband of war. While it is true that raw cotton could be made up into clothing for military uses of a belligerent, a military use of the supply of an army or garrison might possibly be made of food stuffs of every description which might be shipped from neutral ports to the nonblockaded ports of a belligerent. The principles under consideration might, therefore, be extended so as to apply to every article of human use which might be declared contraband of war simply because it might ultimately become in any degree useful to a belligerent for military purposes.

Coal and other fuel and cotton are employed for a great many innocent purposes. Many nations are dependent on them for the conduct of inoffensive industries, and no sufficient presumption of an intended warlike use seems to be afforded by the mere fact of their destination to a belligerent port. The recognition, in principle, of treatment of coal and other fuel and raw cotton as absolutely contraband of war might ultimately lead to a total inhibition of the sale, by neutrals to the people of belligerent states, of all articles which could be finally converted to military uses. Such an extension of the principle by treating coal and all other fuel and raw cotton as absolutely contraband of war, simply because they are shipped by a neutral to a nonblockaded port of a belligerent, would not appear to be in accord with the reasonable and lawful rights of a neutral commerce."

Circular letter of John Hay, Secretary of State, to the ambassadors of the United States in Europe, June 10, 1904.

*The "Knight Commander," Russian and Japanese Prize Cases, vol. 2, p. 54.*—In this case the Libau Prize Court held that the following goods were not liable to condemnation as contraband:—

Slates not destined for the enemy; shovels not adapted for trench digging; iron pipes not suitable for steam boilers; tin sheets; pencils;

steel hoops for packing; wire nails destined for trading purposes; typographer's colours; turpentine; wire not suitable for telegraphs or telephones; instruments for boring naphtha wells; skins and rubber goloshes; drilling machines and lathes; other articles suitable only for peaceful purposes; personal effects of the crew.

*The "Hsiping," Russian and Japanese Prize Cases, vol. 2, pp. 133 and 140.*—The following articles were held not to be contraband "from their nature":—

Flannels, samples of merchandise, tea; English white shirts, black cotton cloth, gray Bombay cotton yarn, green tea, wheels and miscellaneous articles, white cotton thread, cloth, plaster of Paris, basins, soap, sheeting, thread, paper, arsenic and table-ware.

*Cargo Ex "Pehping," Russian and Japanese Prize Cases, vol. 2, p. 164.*—Bombay gray cotton-thread, American gray shirtings, China cloth, cigarettes and playing cards were held not to be contraband "from their nature."

#### Contra as to cotton.

*The "Calchas," Russian and Japanese Prize Cases, vol. 1, p. 118.*—In this case the Russian Supreme Court held cotton, going to an enemy's port, to be condemnable, since the owners had not proved the innocent destination.

The Court said: "In virtue of the Imperial Order of the 18th April 1904, cotton was added to the list of objects declared Contraband of war, apparently in view of the possibility of utilising it for the manufacture, by chemical process, of pyroxyline and other explosive substances."

See also *The Cilurnum*, Russian and Japanese Prize Cases, vol. 1, p. 186; *The St. Kilda*, id., p. 188, in which it was stated that under the said Imperial Order, cotton was unconditional contraband.

*The "Ikhona," Russian and Japanese Prize Cases, vol. 1, p. 226.*—Leather, cotton goods, zinc and tin held not to be contraband.

*Cargo Ex "Bawtry," Russian and Japanese Prize Cases, vol. 2, pp. 273-280.*—The following articles were held not contraband "from their nature": matches, emery wheels, lubricating oil, cotton waste, window glass, soap, iron and zinc sheets, paint brushes, copying press, book-binding tools, re-made paper, English paper, toilet essences, cigarettes, iron roof sheeting, clothing, wooden utensils, hats, enamelled ware, piece goods, waterproof cloth, pens, cotton goods, linen, silk tissue, paper, soda, hydrochloric acid, nitric acid, hemp, iron girders, window glass, roof guttering, spades, scales, bicycle parts, metal ware, heating irons, furniture, mucilage, brushes, machinery, photographic films, photographic paper, chamber utensils, chloride of lime, iron guttering, cotton tissues, delft pottery, sunshades, cotton, emery cloth, glass, woollen goods, table knives, brushes, sewing machines, cocoanut matting, stoves and fittings, iron wire, shavings, meat mincers, perambulator parts, springs, saws, horseshoe nails, cutlery, brass balls, planes, dripping pans, sewing machine needles, yard measures, iron-ware, tools, oil cookers, sand-paper, emery cloth, vises, iron anvils, iron hammers, files, rulers, axes, sewing machines, drawing pins, copying press, kitchen ranges and tiles, scythes, merchandise, iron shafting, copper sheets, patterns, palm-oil, straps, filings, iron bars, clay slabs, paper collars, cuffs,

shirts, boots, grindstones and frames, top boots, window glass, plate glass, iron door hinges, agricultural implements, zinc roofing, galvanized iron roof gutters, scythe fastenings, boot trees, wire netting, door mats, galvanized basins, machinery parts, clay paving tiles, candles, boots and signboard, stove fittings, iron grating stands, iron screws, lacquered wire netting, galvanized wire netting, sieves, sloppails, brass-ware, strop-leather, &c., metal-ware, grindstones, hair-clippers, hand tools, galvanized iron-ware, sand, copper sulphate crystals, drills, steel stone-cutter's saws, iron rakes, cast-iron plugs, dyes, (dry) zinc pails, wire, hammers, hats and samples, cast-iron pumps and fittings, piston-rod and piston, crude petroleum, string, iron screwdrivers, hand tools, iron rakes, glass-ware and lanterns, steel screws, iron dye-mortar, canvas hose-piping, India-rubber, circular sheets, paper, emery, iron clothes rack, perfumes, powder, &c., catalogues, toilet cream, powder, soap, gum-arabic, pure starch, siphons for casks, keys, beds, wall-paper, iron chains, anvils, rivets, cuffs, wooden and cast-iron ware, lamp stands, wash-basins, &c., wash-hand stand and fittings, mirrors, water jugs, white cardboard, brass wire, bath tubs and brushes, lamps, concave lenses, cocoanut oil, zinc-ware, pottery, tin lanterns, mirrors, glass, tinware, crystal glass-ware, tooth-wash, tooth-powder, leather goods, fire extinguishers, aluminium and copper kettles, iron bolts, powdered cocoanut, advertising devices, iron grating bar, iron grating frame, steel-ware, ice machine, carpet sweeper, pumps, wringer, aniline dyes, zinc sheets, line, steel pens, metal mirrors, printed matter, wire rope, decimal scales, steel, book-binding cardboard, powder and dyes, pencils, coloured pencils, coloured inks, printed matter, notice-books, oil paper, green dye (dry), cotton, and cotton and silk fabrics, wire netting, paper bags, iron safes, aluminium pots and pans, rubber erasers, penholders, &c., cabinet-work, paper, ink, &c., mathematical instruments, set squares, T-squares, India-rubber slabs, spiral piping, lamps, drawing instruments, stationery, porcelain, iron washstand and bedsteads, bent-wood furniture, citric acid crystals, steel-ware, wire-ware, brass-ware, workmen's tools, brass sheeting, tin sheeting, screws, packing paper, pig-iron, dry goods, brass balls, tin plates.

*The "Prinsesse Marie," Russian and Japanese Prize Cases, vol. 1, p. 276.*—Paper, nail rods, knitting machines, circular saws, window glass, optical glasses, zinc, wearing apparel and aniline dyes were held not to be contraband.

*The "Tacoma," Russian and Japanese Prize Cases, vol. 2, p. 314.*—Steel bars and machinery fittings bound to an enemy's port were held to be contraband, as materials for ship-building.

#### COTTON.

The United States have gone so far as to regard cotton as contraband of war when, in their view, it took the place of money. "Cotton was contraband of war, during the late Civil War, when it was the basis upon which the belligerent operations of the Confederacy rested." "Cotton was useful as collateral security for loans negotiated abroad by the Confederate government, or was sold by it for cash to meet current expenses, or to purchase arms and munitions of war. Its use for such purposes was publicly proclaimed, and its sale interdicted, except under regulations established by, or under con-

tract with, the Confederate government \* \* \* Cotton in fact was to the Confederacy as much munitions of war as powder and ball, for it furnished the chief means of obtaining these indispensables of warfare. In International Law, there could be no question as to the rights of the Federal commanders to seize it as contraband of war, whether they found it on rebel territory or intercepted it on the way to the parties who were to furnish in return material aid in the form of sinews of war, arms or general supplies."

Mr. Bayard, Secretary of State, to Mr. Murnaya, June 28, 1886. Wharton, digest, iii, 438; Hall, p. 690, note.

Hall, in his work on International Law (see 5th edition, 664), says that "the United States have gone so far as to regard cotton as contraband of war when, in their view, it took the place of money." As authority for this statement he cites Wharton's International Law Digest, III, 438, where an extract is given from a note of Mr. Bayard, as Secretary of State, to Mr. Muruaga, Spanish minister, of June 28, 1886. The extract, as thus printed, separated from its context, unfortunately conveys, as an examination of the correspondence will show, an erroneous impression, which has been widely disseminated and which may not be unconnected with Russia's action during the war with Japan in declaring cotton to be contraband of war. The question under discussion between Mr. Bayard and the Spanish minister was not one of contraband in the sense of maritime law. The question at issue was the rightfulness of the alleged seizure on land, by military forces of the United States, of a quantity of cotton to which the claimants asserted title under a contract with the Confederate government, which then controlled the supply of cotton and used it as its chief resource for the purchase of arms and ammunition and the payment of current expenses. Under these circumstances, it was held by the American courts, as well as by the military authorities, that cotton within the Confederate territory and control was a legitimate subject of capture. In referring to this fact, Mr. Bayard, in his note to Mr. Muruaga, of June 28, 1886, said that there was no doubt that cotton might, under the circumstances described, be seized as "contraband of war," using the term perhaps unadvisedly and at any rate in an untechnical sense, just as it was applied by General Butler to captured slaves. Mr. Bayard's use of the term, however, gave to Mr. Muruaga an opportunity to point out, as he did in a note of August 13, 1886, that the United States did not during the Civil War treat cotton as contraband of war, and that the acceptance of such a proposition would imply an extension of the recognized lists of contraband articles. Mr. Bayard, replying on December 3, 1886, said: "You mistake the position of the United States \* \* \* when you suppose that it is proposed by us formally to insert cotton on the lists of articles contraband of war \* \* \* The seizure by the Government of the United States in 1865 is not to be narrowed to a question of contraband. The distinctions as to contraband have grown up from seizures of neutral vessels at sea, when the presumption arising from the ordinary inviolability of a neutral vessel has to be overcome before the seizure can be sustained. Here the seizure was not on board a neutral vessel, or on neutral territory invaded on ground of necessity, but on

soil over which the United States had rights of sovereignty, not merely by constitutional title, but by the law of nations and by the law of war. \* \* \* It is not needful, nor do I, therefore, say whether cotton purchased in the Confederacy during the war would be liable to seizure as contraband if found on a neutral ship. I propose to strictly construe belligerent rights on the high seas; but the cotton, which is the subject of the present claim, placed as it was by its owners, the present claimants, under what you properly state to be the 'strict surveillance' of the Confederate authorities, was, to the eye of the United States Government when it sought to reclaim the region where such cotton was stored, as much the proper subject of belligerent seizure as would have been a park of artillery."

Moore's Digest, vol. vii. pp. 693, 694; For. Rel. 1887, pp. 1006, 1108, 1015.

There is no need to dwell for long upon the recent addition by Russia of cotton to her list of contraband goods. We are told that her declaration to that effect refers "only to raw cotton suitable for the manufacture of explosives, and not to cotton yarns or tissues." It is difficult to see how the raw cotton destined for the manufacture of explosives is to be distinguished from the raw cotton destined for the manufacture of shirtings or pocket-handkerchiefs. We in England certainly have no good ground for protesting against the capture of what is intended to be made into a most terrible instrument of warfare. In the Admiralty *Manual of Naval Prize Law* the materials for ammunition are ranked along with ammunition in the list of goods absolutely contraband. If Russia means to seize and confiscate no cotton except that which she can prove to be on its way to a Japanese military or naval workshop, there to be manufactured into a powerful explosive, neutrals have no cause of complaint against her. But in that case her recent declaration seems superfluous; for the "Rules" issued by the Imperial Government on February 28 enumerated "explosives and materials for causing explosions" among the articles then declared to be contraband. Moreover, gun-cotton itself was mentioned in them under its scientific name of pyroxylin. Thus the completed article and the substances from which it is made were already penalised, when the recent declaration against raw cotton was published on the 6th of May. It may be that nothing more was intended than to remove every possibility of doubt by making a perfectly explicit statement. But, if that were so, the object in view was not attained, for the explanation itself required to be explained immediately. The term "raw cotton" is quite general. As it stands it includes all the lint which comes from the bolls of the cotton plant. A diplomatic gloss declares that only such of it as is suitable for the manufacture of explosives is intended. If we add that it must be destined to be so manufactured, as well as suitable for the purpose, we have reduced the declaration to proper limits. The action of Russian cruisers and Russian courts should be carefully watched, to make sure they do not step beyond its terms thus interpreted. As long as these are observed, no illegal hardship will be inflicted on neutral trade. But the moment they are overstepped a branch of innocent commerce which is specially important in the Far East is subjected to a most unwarrantable interference. The conciliatory action of Russia with regard to



the cruisers of her Volunteer Fleet (see pp. 205-218) gives reason to hope that neutral susceptibilities will be considered in other matters.

The attempt to quote the action of the United States Government in the great American Civil War, in order to justify Russian action, supposing it to have been directed against cotton in general is singularly unfortunate. In the summer of 1861 the Confederacy took full advantage of the fact that practically the whole of the world's supply of cotton was grown in the Southern States. The sale of it was put under severe restrictions so as to secure the greater part of the crop for the government. It was then used to supply the means for the purchase abroad of ships, arms, and ammunition. Agents of the authorities at Richmond shipped thousands of bales to Liverpool, where it was sold at a high price, and the proceeds drawn against to pay for warlike stores. In these circumstances the Northern generals did not treat cotton as private property, exempt by the laws of war from seizure and destruction. Instead, they burned all they could find in their invasions of Southern territory, and there can be no doubt they were justified in regarding it as a war-supply of the enemy, and therefore subject to whatever severities they thought fit to employ. Their government went further, and declared cotton to be contraband of war. There are grave doubts of the legality of this extreme step; but we may point out that, even assuming it to have been perfectly correct, it affords no justification for proclaiming all raw cotton to be contraband now, in the present state of the war in the Far East. If the soil of Japan grew a large part of the raw materials for the cotton looms of Europe, if the Government of Japan had possessed itself of most of the crop, and if the armaments and warlike stores of Japan were purchased by the proceeds of the sale of the bales so held, then indeed the two cases would be sufficiently similar for the first to be a valuable precedent. But, as things are, there is not the slightest resemblance between them. Japan grows no cotton. She imports from the United States what she requires for her manufactures. Even if the conditions were reversed, and Russia followed the example of the United States by declaring all cotton to be contraband, strong arguments would be forthcoming to show that the declaration could not be justified by International Law. Cotton belonging to the Japanese Government, and found voyaging in Japanese ships, would, of course, be subject to capture as enemy property. But if it were found in neutral ships, could it be captured as contraband? In the first place, there would be no belligerent destination, for by the suppositions on which we are arguing, the cargoes would be on their way to some neutral manufacturing country. In the second place, cotton is harmless in itself and could only be seized as representing specie. Can it be maintained that the law of nations recognises these substitutions of one thing for another in order to turn innocent into noxious goods? We have already seen to what lengths the process may be carried (see p. 165). At one time the argument runs:—Rice equals money; money, when the property of the state, is contraband; therefore rice, when the property of the state, is contraband. At another time it is:—Cotton equals money; money, when the property of the state, is contraband; therefore cotton, when the

property of the state, is contraband. And so we may go on and on, jauntily resolving into contraband one article after another that has in itself little or no connection with warlike uses, and at each step inflicting some fresh disability on neutral trade. Equations are very useful in mathematics. In International Law they look like unmitigated nuisances. It is submitted that the claim of the United States to regard cotton as contraband in 1861 was wanting in legal justification; and that any similar claim which Russia may make in the present war would be still more unlawful. In all probability no such claim has been made or will be made. The very different statement that raw cotton "suitable for the manufacture of explosives" will be deemed contraband of war may be allowed to pass with the reservations already set forth.

Lawrence, *War and Neutrality in the Far East*, pp. 168-174.

As regards *raw cotton*, it is asserted that in 1861, during the Civil War, the United States declared it absolute contraband under quite peculiar circumstances, since it took the place of money sent abroad for the purpose of paying for vessels, arms, and ammunition. But this assertion is erroneous. Be that as it may, raw cotton should not, under ordinary circumstances, be able to be considered absolute contraband. For this reason Great Britain protested when Russia, in 1904 during the Russo-Japanese War, declared cotton in general as contraband; Russia altered her standpoint and declared cotton conditional contraband only.

Oppenheim, vol. 2, pp. 487-488; Taylor's *Treatise on International Public Law* (1901), sec. 662; Moores' *Digest*, Vol. VII, sec. 1254; Holland, *Letters to the Times upon War and Neutrality* (1909), pp. 108-112.

Before the Declaration of London \* \* \* it was in especial controversial whether or no \* \* \* cotton could conditionally be declared contraband.

Oppenheim, vol. 2, pp. 485-486.

"So, also, as regards raw cotton, which by Imperial Order on the 21st April was declared to be absolute contraband of war. Your Excellency may not be aware that British India is by far the largest importer of raw cotton into Japan, the quantities imported in 1901 and 1902 being more than double those imported from the United States of America or from any other country, while the value of raw cotton sent to Japan from India in each of the above-mentioned years amounted to nearly 40,000,000 roubles, and one-half of the total value of all the cotton imported into Japan. The quantity of raw cotton that might be utilized for explosives would be infinitesimal in comparison with the bulk of the cotton exported from India to Japan for peaceful purposes, and to treat harmless cargoes of this latter description as unconditionally contraband would be to subject a branch of innocent commerce, which is especially important in the Far East, to a most unwarrantable interference."

Sir C. Hardinge, British ambassador to Russia to Count Lamsdorf, Russian Foreign Minister, October 9, 1904.

CONTRABAND NOT TO INCLUDE ARTICLES FOR EXCLUSIVE USE OF SICK AND WOUNDED  
AND FOR USE OF VESSEL IN WHICH FOUND, HER CREW AND PASSENGERS DURING  
VOYAGE—REQUISITIONING OF FIRST-NAMED CLASS.

Likewise the following may not be treated as contraband of war:

- (1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.
- (2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.—*Declaration of London, Article 29.*

The articles enumerated in article 29 are also excluded from treatment as contraband, but for reasons different from those which have led to the inclusion of the list in article 28.

Motives of humanity have exempted articles exclusively used to aid the sick and wounded, which, of course, include drugs and different medicines. This does not refer to hospital ships, which enjoy special immunity under the convention of The Hague of the 18th October, 1907, but to ordinary merchant vessels, whose cargo includes articles of the kind mentioned. The cruiser has, however, the right, in case of urgent necessity, to requisition such articles for the needs of her crew or of the fleet to which she belongs, but they can only be requisitioned on payment of compensation. It must, however, be observed that this right of requisition may not be exercised in all cases. The articles in question must have the destination specified in article 30—that is to say, an enemy destination. Otherwise, the ordinary law regains its sway; a belligerent could not have the right of requisition as regards neutral vessels on the high seas.

Articles intended for the use of the vessel, which might in themselves and by their nature be contraband of war, may not be so treated; for instance, arms intended for the defense of the vessel against pirates or for making signals. The same is true of articles intended for the use of the crew and passengers during the voyage; the crew here includes all persons in the service of the vessel in general.

Report of committee which drafted Declaration of London.

Objects necessary for the defense of the crew and ship are not considered contraband of war unless the vessel has made use thereof to resist being stopped, or to resist visit, search or seizure.

Institute, 1882, pp. 51, 52.

Merchantmen frequently carry a gun and a certain amount of ammunition for the purpose of signalling, and, if they navigate in parts of the sea where there is danger of piracy, they frequently carry a certain amount of arms and ammunition for defence against an attack by pirates. It will not be difficult either for the searching belligerent man-of-war or for the Prize Court to ascertain whether or no such arms and ammunition are carried *bona fide*.

Oppenheim, vol. 2, pp. 493-494.

If the quantity of the Goods of a Contraband character does not exceed that which may be required for the use of the Vessel and her Crew, the Vessel is not to be detained.

Holland, p. 18.

Ships of war and merchant-vessels of the enemy are subject to confiscation as prizes, as well as all articles on board, except—

(1) Such as are intended for the private use of the crew or passengers; \* \* \*

Russian Regulations, 1895, Article 10.

Those of such articles [contraband of war] which really constitute the armament and provisions of a vessel of a neutral nationality are exempted from confiscation.

Russian Regulations, 1895, Article 13.

Among the articles enumerated in Articles 13 and 14 [contraband of war], those which from their quantity and nature are clearly to be regarded as intended for use of the ship which carries them shall not be included in the category of articles which are contraband of war.

Japanese Regulations, 1904, Article 18.

Further as not to be regarded contraband of war are the following:—

1. Articles and materials which serve exclusively for the care of the sick and wounded, provided, however, that in case of urgent military necessity, they may be requisitioned for use upon payment therefor, if they have the destination set forth under 29.

2. Articles and materials which are intended for the use of the ship on board which they are found, or for the use of the crew or passengers of the ship during the voyage.

German Prize Rules, 1909, Article 28.

You will not consider as contraband of war arms and munitions exclusively intended for the defence of the ship and in the quantity permitted by custom, unless it has been made use of to resist the search.

French Naval Instructions, 1912, sec. 30.

Section 46, French Naval Instructions, 1912, is substantially identical with Article 29, Declaration of London.

The personal effects of the passengers and crew shall also not be seized.

Turkish Regulations, 1912, ch. 1, art. 1.

Article 29, Declaration of London, is substantially identical with section 56, Austro-Hungarian Manual, 1913.

*The "Panama," 176 U. S., 535.*—In this case the court said: "Yet it must be admitted that arms and ammunition are not contraband of war, when taken and kept on board a merchant vessel as part of her equipment, and solely for her defence against 'enemies, pirates and assailing thieves,' according to the ancient phrase still retained in policies of marine insurance."

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Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land.

Proof of the destination specified in Article 30 is complete in the following cases:—

- (1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.
- (2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.—*Declaration of London, articles 30 and 31.*

The articles included in the list in article 22 are absolute contraband when they are destined for territory belonging to or occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a final destination of this kind can be shown by the captor to exist. It is not, therefore, the destination of the vessel which is decisive, but that of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port; as soon as the captor is able to show that they are to be forwarded from there by land or sea to an enemy country it is enough to justify the capture and subsequent condemnation of the cargo. The very principle of continuous voyage, as regards absolute contraband, is established by article 30. The journey made by the goods is regarded as a whole.

As has been said, the obligation of proving that the contraband goods really have the destination specified in article 30 rests with the captor. In certain cases proof of the destination specified in article 31 is conclusive; that is to say, the proof may not be rebutted.

*First case.*—The goods are documented for discharge in an enemy port; that is to say, according to the ship's papers referring to those goods, they are to be discharged there. In this case there is a real admission of enemy destination on the part of the interested parties themselves.

*Second case.*—The vessel is to touch at enemy ports only, or she is to touch at an enemy port before reaching the neutral port for which the goods are documented, so that although these goods, according to the papers referring to them, are to be discharged in a neutral port, the vessel carrying them is to touch at an enemy port before reaching that neutral port. They will be liable to capture, and the

possibility of proving that their neutral destination is real and in accordance with the intentions of the parties interested is not admitted. The fact that before reaching that destination the vessel will touch at an enemy port would occasion too great a risk for the belligerent whose cruiser searches the vessel. Even without assuming that there is intentional fraud, there might be a strong temptation for the master of the merchant vessel to discharge the contraband, for which he would get a good price, and for the local authorities to requisition the goods.

The same case arises where the vessel, before reaching the neutral port, is to join the armed forces of the enemy.

For the sake of simplicity, the provision only speaks of an enemy port, but it is understood that a port occupied by the enemy must be regarded as an enemy port, as follows from the general rule in article 30.

Report of committee which drafted Declaration of London.

*Destination of contraband.*—As has been said, the second element in the notion of contraband is destination. Great difficulties have arisen on this subject, which find expression in the theory of continuous voyage, so often attacked or adduced without a clear comprehension of its exact meaning. Cases must simply be considered on their merits so as to see how they can be settled without unnecessarily annoying neutrals or sacrificing the legitimate rights of belligerents.

In order to effect a compromise between conflicting theories and practices, absolute and conditional contraband have been differently treated in this connection.

Articles 30 to 32 refer to absolute, and articles 33 to 36 to conditional contraband.

Report of committee which drafted Declaration of London.

The articles of contraband, before enumerated and classified, which may be found in a vessel bound for an enemy's port, shall be subject to detention and confiscation. \* \* \*

Treaty of Peace, Amity, Navigation, and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XIX.

The articles of contraband before enumerated and classified which may be found in a vessel bound to an enemy's port shall be subject to detention and confiscation. \* \* \*

Treaty of Peace, Friendship, Commerce, and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XIX.

During the war objects capable of being immediately employed for war purposes and transported by neutral or enemy national merchant vessels for the account of or destined to the enemy (contraband of war) are subject to seizure.

Institute, 1882, p. 51.

An enemy destination is presumed when the shipment goes to one of the enemy's ports, or to a neutral port which, according to incontestable proofs and indisputable facts, is only an intervening point, with ultimate enemy destination in the same commercial transaction.

Institute, 1896, p. 129.

During war, those objects which, made expressly for war, of immediate and special use therein in their existing state, and transported by sea for the account of or destined to a belligerent, come under the category of contraband of war, are subject to seizure.

Institute, 1897, p. 142.

The examination into the continuous nature of voyages is, or may be necessary in reference alike to blockade, trade with enemies, un-neutral service, and carrying contraband, and, indeed, to all cases where the destination of the vessel or cargo is material. The right of the belligerent is to know the facts. The policy of the neutral is to conceal them. If the destination is really to a hostile port,—if that is the plan or scheme of the voyage,—it is, of course, immaterial what formal acts, intended to deceive, are interposed. If the plan of the voyage is, that the cargo be landed in a neutral port, and thence transhipped to its actual destination, it is to be expected that the neutral, whose object is to deceive, will be careful to go through all the forms which would be gone through with for a cargo actually destined to that neutral port. His object is to assimilate all the acts of a fictitious destination to those of a real destination. Such a cargo will be furnished with bills of lading and invoices, letters of instruction to the master or supercargo, and to the consignee in the neutral port,—all ostensibly contemplating an actual termination of the commercial enterprise there. That may be as well assumed, as it would be assumed that a spy would have not only no signs of his real character about him, but all the usual badges of an opposite character. The shipper may actually intend to have the goods landed in the neutral port, and stored there, and the employment of the vessel may cease there; and the mode, means, and time of transshipment to the real port of destination may be either planned by the shipper or left entirely to the discretion of his agent, and even a sale may be gone through with. All these facts are merely evidential, and consistent alike with an honest and a fraudulent intent. If a real hostile destination is proved *aliunde*, they make the fraudulent character of the scheme the more incontrovertible, while, if a hostile destination is disproved, they are natural and proper. It is the duty of the prize court to sift thoroughly all the facts, and detect the fraud if it exists; none of them having any conclusive and defined legal effect attached to them.

Dana's Wheaton, Note 231.

I am inclined to the opinion, that an actual intent to deliver articles capable of military use directly into military hands, condemns the articles, at all events, as a voluntary intervention of their owner in the war; and that, whether there be or be not such an intent, the belligerent may capture certain articles, because of their destination to a place where they will come under the enemy's control, and so may be used by the enemy in direct military operations.

Dana's Wheaton, Note 226.

#### **When offense begins.**

The inception of the voyage is held to complete the offense; and from the moment that the vessel, with the contraband articles on board, quits her port on a hostile destination, the capture may be legally made. It is by no means necessary to wait till the ship and



goods are actually endeavoring to enter the enemy's port. The voyage being illegal at its commencement, the penalty immediately attaches, and continues to the end of the voyage, or at least so long as the illegality exists.

Halleck, p. 573.

#### **Offense may terminate during voyage.**

It must be observed that the offense does not necessarily continue during the entire outward voyage, even where it was completed by the mere inception with contraband articles on board. "Where there is positive evidence," says Duer, "that, previous to the capture, the voyage had been changed, by the substitution of an innocent port of destination, or that the original port, by capitulation or otherwise, had ceased to be hostile, as the goods were not contraband when seized, the capture is invalid, and restitution is decreed." Although the penalty is not averted by the possibility that the intention to prosecute an illegal voyage, which is in the progress of execution, will be changed before its completion, yet, if the intention, when the capture was made, had, in good faith, been abandoned, or was no longer capable of execution, the *corpus delicti* is extinguished, and the penalty cannot be sustained.

Halleck, p. 575; Duer, On Insurance, vol. 1, pp. 629, 571, 572.

In order to constitute the unlawfulness of the transportation of contraband, it is not necessary that the immediate destination of the ship and cargo should be to an enemy's country or port. If the goods are contraband and destined for the direct use of the enemy's army or navy, the transportation is illegal, and subject to the ordinary penalty. Thus, if an enemy's fleet be lying, in time of war, in a neutral port, and a neutral vessel should carry contraband goods to that port, not intended for sale in the neutral market, but destined to the exclusive supply of the hostile forces, such conduct would be a direct interposition in the war by furnishing essential aid in its prosecution, and consequently would be a flagrant departure from the duties of neutrality.

Halleck, p. 576.

The illegality of the transportation of contraband goods is not confined to an original importation into an enemy's country. The transportation of such articles from one port of the enemy to another, is equally unlawful, and is subject to be treated in the same manner of an original importation. It may equally and as directly tend to assist the enemy in the prosecution of the war.

Halleck, p. 575.

#### **When penalty attaches.**

It is universally admitted that the offence of transporting contraband goods is complete, and that the penalty of confiscation attaches, from the moment of quitting port on a belligerent destination; and a destination is taken to be belligerent if it is not clearly friendly; a vessel is not permitted to leave her course open to circumstances, and to make her destination dependent on contingencies. If in any contingency she may touch at a hostile port she is regarded as liable to capture; she can only save herself by proving that the contingent intention has been definitively abandoned.

Hall, p. 694.

We have repeatedly had to speak of a destination to the enemy as being a condition of goods being contraband, and subject as such to confiscation or preemption. It might be thought clear enough that the destination in question is simply that of the goods, and abroad this has always been the most general opinion. But in England it has been generally maintained by systematic writers that a destination to a hostile port of the ship which carries the goods is further necessary for the belligerent's right to interfere with the latter. If she is bound for a neutral port—at least if such is her ultimate destination and not merely to be used by her as a port of call—the goods are not within the prohibition of contraband and cannot be captured, although their destination may be to the enemy. With this we cannot agree. The difference between the doctrines will appear from the following considerations.

Goods on board a ship destined to a neutral port may be consigned to purchasers in that port or to agents who are to offer them for sale there, in either of which cases what further becomes of them will depend on the consignee purchasers or on the purchasers from the agents. Such goods before arriving at the neutral port have only a neutral destination. On arriving there they are, in Lord Stowell's language, imported into the common stock of the country. If they ultimately find their way to a belligerent port, or to a belligerent army or navy, it will be in consequence of a new destination given them, and this notwithstanding that the neutral port may be a well known market for the belligerent in question to seek supplies in, and that the goods may notoriously have been attracted to it by the existence of such a market. The consignors of the goods to the neutral port may have had an expectation that they would reach the belligerent, but not an intention to that effect, for a person can form an intention only about his own acts, and a belligerent destination was to be impressed on the goods, if at all, by other persons. Therefore it is not contended by any one that on the way to the neutral port there will be a right of capture, whatever the character of the goods.

On the other hand goods on board a ship destined to a neutral port may be under orders from their owners to be forwarded thence to a belligerent port, army or navy, either by a further voyage of the same ship, or by transshipment, or even by land carriage. Such goods are to reach the belligerent without the intervention of a new commercial transaction, in pursuance of the intention formed with regard to them by the persons who are their owners during the voyage to the neutral port. Therefore even during that voyage they have a belligerent destination, although the ship which carries them may have only a neutral one. If that destination is combined with the character required for their being contraband the mischief exists against which a belligerent is allowed to protect himself, his cruiser falls in with the *corpus delicti* at sea, which is the recognised arena for his self-protection, and the voyage of the goods to the neutral port must be regarded in law as being continuous with their voyage or other transit from that port to their final destination.

Westlake, vol. 2, pp. 293, 294.

And now the British government has adopted the doctrine of continuous voyage for searching for contraband, during the South African war, ships bound for the Portuguese neutral port of Lou-

renço Marques in Delagoa Bay, from which the goods would proceed by inland carriage to the enemy South African Republic.

Westlake, vol. 2, p. 297; Correspondence between Great Britain and Germany, Bluebook Cl. 33 (1900).

In France the doctrine of continuous voyage was applied to contraband during the Crimean war in the case of the *Frau Howina*. In Italy it was judicially affirmed during the Abyssinian war in the case of the *Doelwyk*, though confiscation was refused on the ground that before the trial peace had been established. In Germany it has the support of Gessner and Perels, and of the Prussian regulations of 1864, although the German government, in complaining of the search for contraband on the way to Delagoa Bay, attempted to show that British authority was against it. On the whole then it must be recognised as the reigning view that the critical destination in matter of contraband is that of the goods and not that of the ship.

Westlake, vol. 2, p. 298; Calvo, éd<sup>n</sup> 3<sup>me</sup>; sec. 2476, éd<sup>n</sup> 4<sup>me</sup>, sec. 2767; Archives Diplomatiques, January 1879, p. 81; Le Droit des Neutres sur Mer, p. 137; Das Internationale Oeffentliche Seerecht, p. 159; 17 L. Q. R. 197.

These three passages [Articles 30, 35 and 36 of the Declaration of London], taken together, form the grave of a great controversy. In them it received the usual sepulture, a great compromise. It will be necessary to give a brief historical account of it, in order that the present position of the matter may be clearly understood.

In 1793 Great Britain rightly or wrongly forbade neutrals to trade between the colonial and home ports of her enemies, when such commerce was thrown open to them as a war measure after having been closed in time of peace. American vessels entered the French and Spanish colonial trade, and endeavored to evade the British prohibition by putting into a port of the United States *en route*, and then carrying their cargoes on to the forbidden destination. Some of these ships were captured, and the capture generally took place on the second stage of their journey. Sir William Scott laid down that the two voyages made in law but one voyage, and condemned the vessel even when the goods had been passed through the customs house in the American port. This was called the doctrine of continuous voyages. It survived the temporary emergency that gave it birth, because of its obvious applicability to other and more enduring situations. About the middle of the nineteenth century it began to be applied to contraband, and in a few cases connected with the American civil war to blockade. And in the course of its application to new circumstances almost imperceptibly a change came over the doctrine itself. In its second form it dealt with goods rather than ships, and asserted that when the cargo was to be carried on, as part of the same commercial transaction, from a neutral destination perfectly innocent in itself to an enemy's storehouses or a blockaded port, then it was liable to capture on the first stage of its journey as well as the second, irrespective of the fact that the second stage was to be performed in a different ship or by land carriage. Outside the United States the transformed doctrine found little favor in its application to blockade, and we saw in the previous chapter that the Declaration of London banished it from the law relating to that

operation. But a large body of opinion favored its use in cases of contraband, and in 1896 the Institute of International Law introduced it under carefully worded conditions into a set of rules on the subject. It was applied by several prize courts, and found a place in the naval regulations and manuals of various nations, notably in those issued by Russia and Japan for the war of 1904-1905. But in the case of the *Bundesrath* Germany strongly opposed it, and contended that the neutral destination of the vessel was conclusive in her favor, since there could be no question of contraband in a trade between neutral ports. In the Hague Conference of 1907 she maintained her position, not without support in other quarters, while Great Britain's drastic proposition to get rid of difficulties by abolishing the law of contraband was not backed by voting power strong enough to carry it, and has since been dropped altogether. At last in 1909 the Naval Conference of London settled the question by a compromise. The doctrine is not to apply to conditional contraband except in the extraordinary case, which can occur very seldom, of a belligerent which has no coastline. Obviously it would be unfair to allow it to make a neutral port more useful to it in its war than a port of its own could be. A belligerent port can be closed by blockade, but a neutral port cannot. Warlike supplies could be sent to it with absolute impunity in neutral vessels, and could then be forwarded in safety by land carriage to the camps and arsenals of the coastless belligerent. The only way to prevent this is to allow a maritime enemy to intercept the warlike stores at sea, and this is what the Declaration of London does, with due precautions for proof of the hostile destination of the goods before they can be condemned. On the other hand, in cases of absolute contraband the final destination of the goods is to be the decisive element. It would be absurd to suppose that a powerful fleet would rock idly on the waves off a great neutral port, while cargo after cargo of arms and munitions of war were poured in under its eyes, and taken from the quays by a short railway journey to the arsenals of a foe whose navy it had swept from the seas, and whose ports it was keeping under strict blockade. Justice demands that no such perversion of neutrality should be allowed. Humanity cries out against the prolongation of the war which would certainly result from it. And prudence deprecates the putting of such a strain on human nature as would be involved in the attempt to enforce it. Few compromises are popular at the time, but some work admirably in practice. Let us hope that this will be the fate of the particular compromise we have just considered.

Lawrence, pp. 716-719; Baty, *International Law in South Africa*, pp. 4-10, 15-23; *Annuaire*, 1896, p. 231; Lawrence, *International Problem and Hague Conferences*, pp. 186-189.

Whatever may be the nature of articles, they are never contraband unless they are destined for the use of a belligerent in war. Arms and ammunition destined for a neutral are as little contraband as other goods with the same destination. As this hostile destination is essential even for articles which are obviously used in war, such hostile destination is all the more important for such articles of ancipitous use as are only conditionally contraband. Thus, for instance, provisions and coal are perfectly innocent and not at all contraband if they are not purposely destined for enemy troops and

naval forces, but are destined for use by a neutral. However, the destination of the articles must not be confounded with the destination of the vessel which carries them. For, on the one hand, certain articles with a hostile destination are considered contraband although the carrying vessel is destined for a neutral port, and, on the other hand, certain articles, although they are without a hostile destination, are considered contraband because the carrying vessel is to touch at an intermediate enemy port and is, therefore, destined for such port, although her ultimate destination is a neutral port.

Oppenheim, vol. 2, p. 490.

Carriage of contraband commonly occurs where a vessel is engaged in carrying to an enemy port such goods as are contraband when they have a hostile destination. In such cases it makes no difference whether the fact that the vessel is destined for an enemy port becomes apparent from her papers, she being bound to such port, or whether she is found at sea sailing on a course for an enemy port, although her papers show her to be bound to a neutral port. And, further, it makes no difference according to the hitherto prevailing practice of Great Britain and the United States of America at any rate, that she is bound to a neutral port and that the articles concerned are, according to her papers, destined for a neutral port, if only she is to call at an intermediate enemy port or is to meet enemy naval forces at sea in the course of her voyage to the neutral port of destination; for otherwise the door would be open to deceit, and it would always be pretended that goods which a vessel is engaged in carrying to such intermediate enemy places were intended for the neutral port of ultimate destination. For the same reason a vessel carrying such articles as are contraband when they have a hostile destination is considered to be carrying contraband if her papers show that her destination is dependent upon contingencies under which she may have to call at an enemy port, unless she proves that she has abandoned the intention of eventually calling there.

Oppenheim, vol. 2, pp. 497-498: Holland, Prize Law, secs. 69, 70.

On occasions a neutral vessel carrying such articles as are contraband if they have a hostile destination is, according to her papers, ostensibly bound for a neutral port, but is intended, after having called and eventually having delivered her cargo there, to carry the same cargo from there to an enemy port. There is, of course, no doubt that such vessels are carrying contraband whilst engaged in carrying the articles concerned from the neutral to the enemy port. But during the American Civil War the question arose whether they may already be considered to be carrying contraband when on their way from the port of starting to the neutral port from which they are afterwards to carry the cargo to an enemy port, since they are really intended to carry the cargo from the port of starting to an enemy port, although not directly, but circuitously, by a round-about way. The American Prize Courts answered the question in the affirmative by applying to the carriage of contraband the principle of *dolus non purgatur circuitu* and the so-called doctrine of continuous voyages. This attitude of the American Prize Courts has called forth protests from many authorities, British as well as foreign, but Great Britain has not protested, and from the attitude

of the British Government in the case of the *Bundesrath* and other vessels in 1900 during the South African War it could safely, although indirectly only, be concluded that Great Britain considered the practice of the American Prize Courts correct and just, and that, when a belligerent, she intended to apply the same principles. This could also be inferred from Sec. 71 of Holland's *Manual of Naval Prize Law*, which established the rule: "The ostensible destination of a vessel is sometimes a neutral port, while she is in reality intended, after touching, and even landing and colourably delivering over her cargo there, to proceed with the same cargo to an enemy port. In such a case the voyage is held to be 'continuous,' and the destination is held to be hostile throughout." And provided that the intention of the vessel is really to carry the cargo circuitously, by a roundabout way, to an enemy port, and further provided, that a mere suspicion is not held for a proof of such intention, I cannot see why this application of the doctrine of continuous voyages should not be considered reasonable, just, and adequate.

Oppenheim, vol. 2, pp. 499-500.

It also happens in war that neutral vessels carry to neutral ports such articles as are contraband if bound for a hostile destination, the vessel being cognisant or not of the fact that arrangements have been made for the articles to be afterwards brought by land or sea into the hands of the enemy. And the question has arisen whether such vessels on their voyage to the neutral port may be considered to be carrying contraband of war. As early as 1855, during the Crimean War, the French Conseil-Général des Prises, in condemning the cargo of saltpetre of the Hanoverian neutral vessel *Vrouw Hourvina*, answered the question in the affirmative; but it was not until the American Civil War that the question was decided on principle. Since from the British port of Nassau, in the Bahamas, and from other neutral ports near the coast of the Confederate States, goods, first brought to these nearer neutral ports by vessels coming from more distant neutral ports were carried to the blockaded coasts of the Southern States, Federal cruisers seized several vessels destined and actually on their voyage to Nassau and other neutral ports because all or parts of their cargoes were ultimately destined for the enemy. And the American Courts considered those vessels to be carrying contraband, although they were sailing from one neutral port to another, on clear proof that the goods concerned were destined to be transported by land or sea from the neutral port of landing into the enemy territory. The leading cases are those of the *Springbok* and *Peterhoff*, \* \* \* for the Courts found the seizure of these and other vessels justified on the ground of carriage of contraband as well as on the ground of breach of blockade. Thus, another application of the doctrine of continuous voyages came into existence, since vessels whilst sailing between two neutral ports could only be considered to be carrying contraband when the transport first from one neutral port to another and afterwards from the latter to the enemy territory had been regarded as one continuous voyage. This application of the doctrine of continuous voyages is fitly termed "doctrine of continuous transports."

This application of the doctrine of continuous voyages under the new form of continuous transports has likewise been condemned

by many British and foreign authorities: but Great Britain did not protest in this case either—on the contrary as was mentioned above in Sec. 385 (4), she declined to interfere in favour of the British owners of the vessels and cargoes concerned. And that she really considered the practice of the American Courts just and sound became clearly apparent by her attitude during the South African War. When, in 1900, the *Bundesrath*, *Herzog*, and *General*, German vessels sailing from German neutral ports to the Portuguese neutral port of Lorenzo Marques in Delagoa Bay, were seized by British cruisers under the suspicion of carrying contraband, Germany demanded their release, maintaining that no carriage of contraband could be said to take place by vessels sailing from one neutral port to another. But Great Britain refused to admit this principle, maintaining that articles ultimately destined for the enemy were contraband, although the vessels carrying them were bound for a neutral port.

There is no doubt that this attitude of the British Government was contrary to the opinion of the prominent English writers on International Law. Even the *Manual of Naval Prize Law*, edited by Professor Holland in 1888, and “issued by authority of the Lords Commissioners of the Admiralty,” reprobated the American practice, for in Sec. 72 it lays down the following rule: \* \* \* “If the destination of the vessel be neutral, then the destination of the goods on board should be considered neutral, notwithstanding it may appear from the papers or otherwise that the goods themselves have an ulterior destination by transshipment, overland conveyance, or otherwise.” And the practice of British Prize Courts in the past would seem to have been in accordance with this rule.

Oppenheim, vol. 2, pp. 500–503; Baty, *International Law in South Africa* (1900), pp. 1–44; Calvo, V, sec. 2767, p. 52; *Parliamentary Papers*, Africa, No. 1 (1900); Twiss in *The Law Magazine and Review*, XII, (1877), pp. 130–158; Holland, *Letters to the “Times” upon War and Neutrality* (1909), pp. 114–119.

Although the majority of Continental writers condemn the doctrine of continuous transports, several eminent Continental authorities support it. Thus, Gessner (p. 119) emphatically asserts that the destination of the carrying vessel is of no importance compared with the destination of the carried goods themselves. Bluntschli, although he condemns in Sec. 835 the American practice regarding breach of blockade committed by a vessel sailing from one neutral port to another, expressly approves in Sec. 813 of the American practice regarding carriage of contraband by a vessel sailing between two neutral ports, yet carrying goods with a hostile destination. Kleen (I. Sec. 95, p. 388) condemns the rule that the neutral destination of the vessel makes the goods appear likewise neutral, and defends seizure in the case of a hostile destination of the goods on a vessel sailing between two neutral ports; he expressly states that such goods are contraband from the moment the carrying vessel leaves the port of loading. Fiore (III. No. 1649) reprobates the theory of continuous voyages as applied by British and American Courts, but he asserts nevertheless that the hostile destination of certain goods carried by a vessel sailing to a neutral port justifies the vessel being regarded as carrying contraband, and the seizure thereof. Bönfilis (No. 1569) takes up the

same standpoint as Bluntschli, admitting the application of the theory of continuous voyages to carriage of contraband, but reprobating its application to breach of blockade. And the Institute of International Law adopted the rule: "*La destination pour l'ennemi est présumée lorsque le transport va à l'un de ses ports, ou bien à un port neutre qui, d'après des preuves évidentes et de fait incontestable, n'est qu'une étape pour l'ennemi, comme but final de la même opération commerciale.*" Thus this representative body of authorities of all nations has fully adopted the American application of the doctrine of continuous voyages to contraband, and thereby recognised the possibility of circuitous as well as indirect carriage of contraband.

And it must be mentioned that the attitude of several Continental States has hitherto been in favour of the American practice. Thus, according to Secs. 4 and 6 of the Prussian Regulations of 1864 regarding Naval Prizes, it was the hostile destination of the goods or the destination of the vessel to an enemy port which made a vessel appear as carrying contraband and which justified her seizure. In Sweden the same was valid. Thus, further, an Italian Prize Court during the war with Abyssinia in 1896 justified the seizure in the Red Sea of the Dutch vessel *Doelwijk*, which sailed for the neutral French port of Djibouti, carrying a cargo of arms and ammunition destined for the Abyssinian army and to be transported to Abyssinia after having been landed at Djibouti.

Oppenheim, vol. 2, pp. 504-505; Sec. 1 Réglementation internationale de la contrebande de guerre, *Annuaire*, XV (1896), p. 230; Kleen, I, p. 389. Note 2; Martens, N. R. G. 2d ser., XXVIII, p. 66.

\* \* \* Article 30 [of the Declaration of London] recognizes with regard to *absolute* contraband the application of the doctrine of continuous voyages—both to circuitous and indirect carriage of contraband. \* \* \*

Oppenheim, vol. 2, p. 505.

All Goods fit for purposes of war only, and certain other Goods which, though fit also for the purposes of peace, are in their nature peculiarly serviceable to the Enemy in war, on board a Vessel which has a hostile destination, are Absolutely Contraband.

Holland, pp. 18 and 19.

A Neutral Vessel is herself Contraband, and should therefore be detained, if she is fitted as a Vessel of War, and is going for sale to a Hostile destination.

Holland, p. 25.

**Contra as to indirect transportation.**

A Vessel's destination should be considered Neutral if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be Neutral, and if in no part of her Voyage she is to go to the Enemy's Fleet at Sea.

A Vessel's destination should be considered Hostile if either the port to which she is bound, or any intermediate port at which she is to call in the course of her voyage, be hostile, or if in any part of her Voyage she is to go to the Enemy's Fleet at Sea.

It frequently happens that a Vessel's destination is expressed in her Papers to be dependent upon contingencies. In such case the



destination should be presumed Hostile, if any one of the ports which under any of the contingencies she may be intended to touch at or go to be Hostile; but this presumption may be rebutted by clear proof that the Master has definitively abandoned a Hostile destination, and is pursuing a Neutral one.

The ostensible destination of the Vessel is sometimes a Neutral port, while she is in reality intended, after touching, and even landing and colorably delivering over her cargo there, to proceed with the same cargo to an Enemy port. In such a case the voyage is held to be 'Continuous,' and the destination is held to be Hostile throughout.

The destination of the Vessel is conclusive as to the destination of the Goods on board. If, therefore, the destination of the Vessel be Hostile, then the destination of the Goods on board should be considered Hostile also, notwithstanding it may appear from the Papers or otherwise that the Goods themselves are not intended for the Hostile port, but are intended either to be forwarded beyond it to an ulterior Neutral destination, or to be deposited at an intermediate Neutral port.

On the other hand, if the destination of the Vessel be Neutral, then the destination of the Goods on board should be considered Neutral, notwithstanding it may appear from the Papers or otherwise that the Goods themselves have an ulterior Hostile destination, to be attained by transhipment, overland conveyance, or otherwise.

Holland, pp. 21 and 22.

The cargo of merchant vessels of a neutral nationality is liable to be confiscated as a prize:

(1) When such cargo is contraband of war in course of transportation to the enemy or to an enemy's port, and it is not proved that the master of the vessel was unaware of the declaration of war.

Russian Regulations, 1895, Article 12.

Articles of the first class [absolute contraband], destined for ports of the enemy or places occupied by his forces, are always contraband of war.

U. S. Naval War Code, 1900, Article 34.

The general rule shall be that the destination of a ship is the destination of her cargo.

Japanese Regulations, 1904, Article 15.

In the case of a ship, the destination of which is not the enemy territory, should an intermediate port at which she calls during her voyage be within the enemy territory, or should there be a presumption that she is sailing to meet a ship of war or other ship of the enemy, her destination shall be held to be the enemy territory.

Japanese Regulations, 1904, Article 16.

In the case of a ship, the destination of which is not the enemy territory, whether she calls at that destination and discharges cargo or not, if there is reason to believe that the cargo in question is being conveyed to the enemy territory, her voyage shall be regarded as a continuous voyage, and her destination shall be held to have been, from the commencement, the enemy territory.

Japanese Regulations, 1904, Article 17.

Articles of absolute contraband are subject to seizure (see 43) when it is evident that they are destined for the hostile country or for a country occupied by the hostile forces. It makes no difference whether the delivery of these goods be accomplished directly, or by transshipment or forwarding by land.

The captain must regard the hostile destination as indicated without further proof:

(a) when the merchandise is destined to be unloaded in a hostile port or for delivery to a hostile force.

(b) when the ship will touch only at enemy ports, or fall in with enemy forces before she will reach neutral port to which the merchandise is consigned.

German Prize Rules, 1909, Articles 29 and 30.

#### **Treatment of passengers and crew of ship captured for contraband.**

If a neutral ship is captured according to 39, for contraband \* \* \* the entire crew—including the Master and officers—will be released unconditionally.

The release will be accomplished by discharge from on board when the prize is delivered. The necessary witnesses are however to be held. The names of the conditionally released enemy and neutral persons are to be reported direct to the Chief of Admiral Staff, for communication to the hostile power.

Passengers on board captured ships are to be left free from restraint and with the exception of necessary witnesses are to be released as soon as practicable.

German Prize Rules, 1909, Articles 101-103.

The above enumerated articles [absolute contraband] are contraband if it appears to you that they are intended for the territory of the enemy or for territory occupied by him or for his armed forces. It is immaterial whether the carrying vessel is itself bound for a neutral port.

French Naval Instructions 1912, sec. 32.

Enemy destination of absolute contraband is considered as finally proved in the following cases:

(1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy;

(2) When, although the goods are documented for a neutral port, the vessel has to call at enemy ports only, or when she has to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.

French Naval Instructions, 1912, sec. 33.

Articles 30 and 31, Declaration of London, are substantially identical with sections 57, 58, respectively, Austro-Hungarian Manual, 1913.

“Provisions and munitions of war sent to belligerent cruisers are unquestionably contraband of war.”

Mr. Bayard, Secretary of State, to Mr. Smithers, chargé in China, June 1, 1885, For. Rel. 1885, 173.

*The "Sally,"* 2 *C. Rob.*, 300.—In this case, corn, held to be the property of the French government, and captured while on board a neutral vessel, bound for France, was condemned.

**Contraband not liable to capture if destination changed en route from hostile to neutral.**

*The "Imina,"* 3 *C. Rob.*, 167.—This was the case of a vessel, loaded with ship timber, which sailed for the hostile port of Amsterdam, but, before capture, the master, without knowledge of the owners, had changed her course to the neutral port of Embden.

Held that the owners were entitled to the benefit of the variation of the course, and that under such variation, the question of contraband did not arise.

See to the same effect *The Lincluden*, Russian and Japanese Prize Cases, vol. 2, p. 341.

*The "Edward,"* 4 *C. Rob.*, 70.—The court said: "The transfer of contraband articles from one port of a country to another is subject to be treated in the same manner as an original importation into the country itself."

*The "Richmond,"* 5 *C. Rob.*, 325.—In this case the vessel was seized in a British port, carrying contraband articles, the destination of which, either positive or eventual, appeared to be an enemy port, where also the master expressed his intention of selling the vessel.

The cargo was condemned.

*The "William,"* 5 *C. Rob.*, 395.—In this case it was held that even the landing of the goods in a neutral port and the payment of duties on them, does not interrupt the continuity of the voyage of the cargo, unless there be an honest intention to incorporate them into the common stock of the country, and that, if there be an intention, either formed at the time of original shipment, or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken by any transactions at the intermediate port.

*Jecker v. Montgomery*, 18 *Howard*, 114.—This was a case involving American shipments to Mexico during the war between the two countries.

The court said: "Attempts have been made to evade the rule of public law by the interposition of a neutral port between the shipment from the belligerent port and the ultimate destination in the enemy's country; but in all such cases the goods have been condemned as having been taken in a course of commerce rendering them liable to confiscation."

*The "Bermuda,"* 3 *Wall.*, 314.—This was the case of a vessel, purporting to have been British-owned, which, during the Civil War in the United States, sailed from Liverpool to Bermuda, with a cargo largely contraband, and after touching at Bermuda but not unloading, was captured while apparently en route to Nassau. There was a spoliation of papers, just before capture, and evidence tending to show that the cargo of the ship was destined, either directly, or by transshipment, to a blockaded port of the Southern Confederacy.

Ship and cargo were condemned and the court said: "But if it is intended to affirm that a neutral ship may take on a contraband cargo

ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it."

The court further said: "It makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo.

"The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade-runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene.

\* \* \* \* \*

"The same principle is equally applicable to the conveyance of contraband to belligerents; and the vessel, which, with the consent of the owner, is so employed in the first stage of a continuous transportation, is equally liable to capture and confiscation with the vessel which is employed in the last if the employment is such as to make either so liable.

"This rule of continuity is well established in respect to cargo."

*The "Peterhoff," 5 Wall., 28.*—This was a case of an English vessel, bound during the civil war in the United States, to Matamoros, Mexico, immediately across the Rio Grande from territory of the state of Texas, which was a part of the Southern Confederacy. The vessel, which contained goods useful in war, was seized and condemned on the ground that the goods were contraband.

The court said: "The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes.

"Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

"A considerable portion of the cargo of the *Peterhoff* was of the third class, and need not be further referred to.

"A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was, in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness, and of articles described in the

invoices as 'men's army bluchers,' 'artillery boots,' and 'Government regulation grey blankets.' These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army.

"It is true that even these goods, if really intended for sale in the market of Matamoros, would be free of liability; for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock-in-trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

"And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not.

"The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband and articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoros and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture, though primarily destined to Matamoros.

"We are obliged to conclude that the portion of the cargo which we have characterised as contraband must be condemned."

[It should be noted that the articles specified are all apparently classed in the Declaration of London as absolute contraband.]

*The "Stephen Hart," Blatchford's Prize Cases, 387.*—This was a case of the capture in 1862, by a United States man-of-war of a British vessel, bound ostensibly from London to Cardenas, Cuba, with a cargo of munitions of war and army supplies.

The court said: "The question whether or not the property laden on board of the *Stephen Hart* was being transported in the business of lawful commerce, is not to be decided by merely deciding the question as to whether the vessel was documented for, and sailing upon, a voyage from London to Cardenas. The commerce is in the destination and intended use of the property laden on board of the vessel, and not in the incidental, ancillary, and temporary voyage of the vessel, which may be but one of many carriers through which the property is to reach its true and original destination. If this were not the rule of the prize law, a very wide door would be opened for fraud and evasion. A cargo of contraband goods, really intended for the enemy, might be carried to Cardenas, in a neutral vessel sailing from England with papers which, on their face, import merely a voyage of the vessel to Cardenas, while in fact, her cargo, when it left England, was destined by its owners to be delivered to the enemy by being transhipped at Cardenas into a swifter vessel. And such,

indeed, has been the course of proceeding in many cases during the present war. \* \* \*

"The law seeks out the truth, and never, in any of its branches, tolerates any such fiction as that under which it is sought to shield the vessel and her cargo in the present case. If the guilty intention, that the contraband goods should reach a port of the enemy, existed when such goods left their English port, that guilty intention cannot be obliterated by the innocent intention of stopping at a neutral port on the way. If there be, in stopping at such port, no intention of trans-shipping the cargo, and if it is to proceed to the enemy's country in the same vessel in which it came from England, of course there can be no purpose of lawful neutral commerce at the neutral port by the sale or use of the cargo in the market there; and the sole purpose of stopping at the neutral port must merely be to have upon the papers of the vessel an ostensible neutral terminus for the voyage.

"If, on the other hand, the object of stopping at the neutral port be to trans-ship the cargo to another vessel to be transported to a port of the enemy, while the vessel in which it was brought from England does not proceed to the port of the enemy, there is equally an absence of all lawful neutral commerce at the neutral port; and the only commerce carried on in the case is that of the transportation of the contraband cargo from the English port to the port of the enemy, as was intended when it left the English port. This court holds that, in all such cases, the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture; as well before arriving at the first neutral port at which she touches after her departure from England, as on the voyage or transportation by sea from such neutral port to the port of the enemy. \* \* \*

"There must, therefore, be a decree condemning both vessel and cargo."

#### Contra.

*The "Tetartos," Russian and Japanese Prize Cases, Vol. 1, p. 166.*—This was the case of a German steamer, captured while carrying railroad sleepers (ties) to a Chinese port. Since sleepers were contraband and because certain circumstances led the Russian commander to believe that the real destination was Japan, he sank the vessel, being unable to send her to a Russian port.

Held by the Russian Supreme Court that the cargo was not contraband since the destination of the vessel was a neutral port and Russia did not recognize the doctrine of continuous voyage.

*The "Lydia," Russian and Japanese Prize Cases, vol. 2, p. 359.*—This was the case of a neutral ship found to be carrying contraband to a Russian coastal fortress and supply-base. Owing to damages to her steering-gear, she put back, intending to go to a neutral port for repairs, but she sustained further damage and was compelled to enter a Japanese port.

Held that the object of the voyage (the carriage of contraband) was not abandoned, and the ship was condemned.

PROOF AS TO VOYAGE OF VESSEL CARRYING CONTRABAND.

Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.—*Declaration of London, Article 32.*

The papers therefore are conclusive proof of the course of the vessel, unless she is encountered in circumstances which show that their statements are not to be trusted. See also the explanations given as regards article 35.

Report of committee which drafted Declaration of London.

If the ship has articles of absolute contraband on board, the data in the ship's papers concerning her further voyage are to be accorded full credence, unless the ship has plainly deviated from the route designated in her ships papers, without being able to justify it, or facts appear which establish beyond doubt that the said data in the papers is false. (See 37, sentence 1.)

German Prize Rules, 1909, Article 31.

Article 32, Declaration of London is identical with section 34, French Naval Instructions, 1912.

Article 32, Declaration of London, is apparently identical with section 59, Austro-Hungarian Manual, 1913.

*The "Sarah Cristina," 1 C. Rob., 237.*—This was the case of a Swedish ship destined according to her papers to Cagliari, an Italian port, but captured going into the enemy port of Cherbourg. The explanation was that the ship was entering Cherbourg to take on water.

The Court considered that the place of capture, together with the fact that the ship-broker, before whom the owner of the cargo swore to the charter-party, was a French vice-consul, and other suspicious circumstances, indicated that the destination of the ship was an enemy port, and condemned the cargo.

**Ships papers held to be presumptive evidence.**

*Miller v. The "Resolution," 2 Dallas, 19.*—The court said: " \* \* \* if in this case the papers on board affirm the ship and cargo be such property as is not prize, there must be an acquittal, unless the captors are able, by a contrariety of evidence, to defeat the presumption, which arises from the papers, and can show just grounds for condemnation. On the other hand, if the papers affirm the ship and cargo to be the property of an enemy, there must be a condemnation, unless they who contest the capture can produce clear and unquestionable evidence to prove the contrary."

CIRCUMSTANCES UNDER WHICH CONDITIONAL CONTRABAND LIABLE TO CAPTURE—PRESUMPTION AS TO DESTINATION.

Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4).

The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband.

In cases where the above presumptions do not arise, the destination is presumed to be innocent.

The presumptions set up by this Article may be rebutted.—*Declaration of London, Articles 33 and 34.*

The rules for conditional contraband differ from those laid down for absolute contraband in two respects: (1) There is no question of destination for the enemy in general, but of destination for the use of his armed forces or government departments; (2) the doctrine of continuous voyage is excluded. Articles 33 and 34 refer to the first and article 35 to the second principle.

The articles included in the list of conditional contraband may serve for peaceful uses as well as for hostile purposes. If from the circumstances the peaceful purpose is clear, their capture is not justified; it is otherwise if a hostile purpose is to be assumed, as, for instance, in the case of foodstuffs destined for an enemy army or fleet, or of coal destined for an enemy fleet. In such a case there is clearly no room for doubt. But what is the solution when the articles are destined for the civil government departments of the enemy state? It may be money sent to a government department for use in the payment of its official salaries, or rails sent to a department of public works. In these cases there is enemy destination which renders the goods liable in the first place to capture and in the second to condemnation. The reasons for this are at once legal and practical.



The state is one, although it necessarily acts through different departments. If a civil department may freely receive foodstuffs or money, that department is not the only gainer, but the entire state, including its military administration, gains also, since the general resources of the state are thereby increased. Further, the receipts of a civil department may be considered of greater use to the military administration and directly assigned to the latter. Money or foodstuffs really destined for a civil department may thus come to be used directly for the needs of the army. This possibility, which is always present, shows why destination for the departments of the enemy state is assimilated to that for its armed forces.

It is the departments of the state which are dependent on the central power that are in question and not all the departments which may exist in the enemy state; local and municipal bodies, for instance, are not included, and articles destined for their use would not be contraband.

War may be waged in such circumstances that destination for the use of a civil department can not be suspect, and consequently can not make goods contraband. For instance, there is a war in Europe, and the colonies of the belligerent countries are not in fact affected by it. Foodstuffs or other articles in the list of conditional contraband destined for the use of the civil government of a colony would not be held to be contraband of war, because the considerations adduced above do not apply to their case; the resources of the civil government can not be drawn on for the needs of the war. Gold, silver, or paper money are exceptions, because a sum of money can easily be sent from one end of the world to the other.

Contraband articles will not usually be directly addressed to the military authorities or to the government departments of the enemy state. Their true destination will be more or less concealed, and the captor must prove it in order to justify their capture. But it has been thought reasonable to set up presumptions based on the nature of the person to whom, or place for which, the articles are destined. It may be an enemy authority or a trader established in an enemy country who, as a matter of common knowledge, supplies the enemy government with articles of the kind in question. It may be a fortified place belonging to the enemy or a place used as a base, whether of operations or of supply, for the armed forces of the enemy.

This general presumption may not be applied to the merchant vessel herself on her way to a fortified place, though she may in herself be conditional contraband, but only if her destination for the use of the armed forces or government departments of the enemy state is directly proved.

In the absence of the above presumptions, the destination is presumed to be innocent. That is the ordinary law, according to which the captor must prove the illicit character of the goods which he claims to capture.

Finally, all the presumptions thus set up in the interest of the captor or against him may be rebutted. The national tribunals, in the first place, and, in the second, the international court, will exercise their judgment.

Report of committee which drafted Declaration of London.

But one belligerent may prevent the other from obtaining direct military aid; and goods of a certain description, bound into the country of the one, are so liable to become directly military aid, that they may be intercepted by the other. This is the practical result of the conflict of the two forces of war and of trade. In administering this law, the question has arisen, whether the belligerent is limited to an inspection into the intrinsic nature of the goods themselves, or may look further. It is agreed, that a class of goods may be declared, in their inherent nature, exclusively or substantially of military use, and that these he may intercept without further inquiry. It is also agreed, that there are goods not coming within that class, but which are capable of direct military as well as civil use, as to which their intrinsic nature alone ought not to furnish conclusive proof in their favor. The question is, shall the fact of their ambiguous character stop, or shall it open, further inquiry? The weight of practice by belligerents or concession by neutrals, and of the opinions of writers, has certainly hitherto been in favor of the latter course.

Dana's Wheaton, Note 226.

The probable use of articles is inferred from their known destination. This rule seems neither unjust nor unequal. \* \* \* It applies equally to unwrought materials and ordinary naval stores. If, when they are destined to a *commercial* port, it is a just presumption that they are intended solely for civil use, it is evident that this presumption exists in all cases when such is their destination, from whatever country they may be exported, and hence, in all such cases, the presumption should be admitted for their protection, as it is for their condemnation when destined to a port of naval equipment. The distinction in favor of those which are the produce of the country from which they are imported, does not seem to be well founded.

Halleck, pp. 586, 587.

While the exigencies of belligerency must primarily control the definition of contraband, and therefore to a great extent settle the list of contraband merchandise, there is a point at which accepted law offers a barrier to further dictation on their part. Except to the limited degree which has been indicated in treating of belligerent rights, acts of war cannot be directed against the non-combatant population of an enemy state. Hence seizure of articles of commerce becomes illegitimate so soon as it ceases to aim at enfeebling the naval and military resources of the country and puts immediate pressure upon the civil population.

Hall, pp. 681, 682.

Whatever may be the nature of articles, they are never contraband unless they are destined for the use of a belligerent in war. Arms and ammunition destined for a neutral are as little contraband as other goods with the same destination. As this hostile destination is essential even for articles which are obviously used in war, such hostile destination is all the more important for such articles of ancipitous use as are only conditionally contraband. Thus, for in-

stance, provisions and coal are perfectly innocent and not at all contraband if they are not purposely destined for enemy troops and naval forces, but are destined for use by a neutral. However, the destination of the articles must not be confounded with the destination of the vessel which carries them. For, on the one hand, certain articles with a hostile destination are considered contraband although the carrying vessel is destined for a neutral port, and, on the other hand, certain articles, although they are without a hostile destination, are considered contraband, because the carrying vessel is to touch at an intermediate enemy port and is, therefore, destined for such port, although her ultimate destination is a neutral port.

Oppenheim, vol. 2, p. 490.

All Goods fit for purposes of war and peace alike, (not hereinbefore specified as Absolutely Contraband), on board a vessel which has a hostile destination, are Conditionally Contraband, that is, they are contraband only in case it may be presumed that they are intended to be used for purposes of war. This presumption arises when such hostile destination of the Vessel is either the Enemy's Fleet at Sea or a hostile Port used exclusively or mainly for Naval or Military Equipment (Jonge Margaretha, 1 C. Rob. 188. Peterhof, 5 Wallace, 58).

Holland, p. 20.

Articles of the second class [conditionally contraband], when actually and especially destined for the military or naval forces of the enemy, are contraband of war.

U. S. Naval War Code, 1900, Article 34.

32. Articles of conditional contraband are subject to seizure (see 43), as far as the conditions of No. 35 are fulfilled, when it is clear that they are destined for the use of the forces or the supply depots of the enemy state, unless in the latter case, according to the evidence of circumstances, these articles cannot actually be used for the war in progress. Gold and silver, in coin or in bullion, as well as paper money, is in consequence always to be regarded as capable of use in the war.

Administrative authorities which are not directly subject to the central government (as for example city and local governments), are not to be considered as administrative authorities of the state.

33. The captain must, in the absence of circumstances to the contrary, regard the hostile destination as evident:—

(a) when the consignment is addressed to an enemy authority, or  
(b) to a dealer situated in the enemy country of whom it is known that he is a supplier to the forces or to the administrative authorities of the enemy state of articles of questionable character or source, or

(c) when the consignment is addressed to a fortified place of the enemy, or

(d) to another place which serves the enemy forces as a base of operations or supplies.

Merchant vessels themselves are, however, not on that account to be regarded as destined for the enemy forces, etc., because they are

proceeding to one of the places referred to under (c) and (d); on the contrary there must be still other circumstances in order to justify the assumption of a hostile destination, according to 32.

34. When under the conditions of 33 there is apparently no clear case, the captain will assume a hostile destination in the sense of No. 32 only when there is a well-grounded prospect to prove its existence.

German Prize Rules, 1909. Articles 32-34.

The articles above enumerated [conditional contraband] are contraband if it appears to you that they are intended for the use of the armed forces or government departments of the enemy State, unless in this latter case the circumstances show that the articles can not in fact be used for the purposes of the war in progress; this latter exception does not apply to gold and silver in coin or bullion or to paper money.

French Naval Instructions, 1912, sec. 37.

You will consider that the articles of conditional contraband have the destination above indicated if the consignment is addressed to enemy authorities or to a merchant, established in the enemy country, and when it is well known that this merchant supplies articles and materials of this kind to the enemy. The presumption is the same if the consignment is destined to an enemy fortified place or any other place serving as a base of operations or supply for the enemy armed forces.

If, without being able to find complete proof, you nevertheless have sufficient reason to believe that the articles of conditional contraband, whose discharge is to take place in enemy territory or territory occupied by the enemy, have the hostile destination above indicated, you may seize the ship carrying this contraband.

In the absence of the above presumptions, the destination is presumed to be innocent.

French Naval Instructions, 1912, secs. 38, 39, and 40.

Articles 33 and 34, Declaration of London, are substantially identical with sections 60, 61, Austro-Hungarian Manual, 1913.

FOREIGN OFFICE, *January 10, 1900.*

"DEAR MR. CHOATE: Our view is that foodstuffs, with a hostile destination, can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of the seizure.

Believe me, etc.,

SALISBURY."

Enclosure to despatch from Ambassador Choate to Secretary of State Hay, January 12, 1900.

"In consequence of doubts which have arisen as to the interpretation of Article 6, section 10, of the Regulations respecting Contraband of War, it has been resolved by the Imperial Government that the articles capable of serving for a warlike object, *in regard to*

which no decision has been taken, including rice and food-stuffs, shall be considered as contraband of war, if they are destined for—

The Government of the belligerent Power:

For its administration;

For its army;

For its navy;

For its fortresses;

For its naval ports; or

For its purveyors."

Count Lamsdorff, Russian Foreign Minister, to Sir C. Hardinge, British Ambassador to Russia, October 22 (9), 1904, enclosed with despatch of the ambassador to the British Foreign Office, October 24, 1904.

*The "Jonge Margaretha," 1 C. Rob., 189.*—A cargo of cheese, on board a neutral vessel, bound from Amsterdam to Brest, was condemned as contraband of war, principally on the ground that it was destined to the great port of naval equipment of the enemy, it appearing that the cheese was suitable for naval use.

*Maissonnaire v. Keating, 2 Gallison.*—This was the case of a cargo of provisions; and the court held that provisions going to a port of naval equipment of the enemy, and *a fortiori*, if destined for the supply of his army, became contraband, and subjected the vessel (probably belonging to the owner of the cargo) and the cargo, to confiscation by the other belligerent.

*The "Commercen," 1 Wheaton, 382.*—This was the case of a Swedish vessel captured during the war of 1812, while on a voyage from Ireland, to Bilboa in Spain, carrying a cargo of barley and oats belonging to British subjects and apparently destined for the sole use of the British forces then in Spain.

The court said:—"By the modern law of nations, provisions are not, in general, deemed contraband but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in the enemy's country they are not in general contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband."

**Contra as to presumption of innocent destination.**

*The "Albo," 1 Spinks Adm. Rep., 350.*—In this case the court laid down the rule that where cargo is shipped *flagrante bello*, the bills of lading on their face ought to express for whose account and risk the property was shipped.

**Contra as to presumption of innocent destination.**

*The "Springbok," 5 Wall., 1.*—In this case the ship was bound to Nassau, in the Bahama Islands. But the Supreme Court inferred that some other destination was intended, partly from the fact that by the bills of lading and the manifest the cargo was consigned to order or assigns.

Respecting this inference of the Court, the British Foreign Office said on July 24, 1868: "Having regard to the very doubtful character of all trade ostensibly carried on at Nassau during the late war in the United States, and to many other circumstances of suspicion before the court, Her Majesty's Government are not disposed to consider the argument of the court on this point as otherwise than tenable."

Moore's Digest, vol. vii, p. 724.

*The "Peterhoff,"* 5 Wall., 28.—In this case the court said that articles which may be and are used for purposes of war and peace, according to circumstances, are contraband only when actually destined to the military or naval use of a belligerent.

*The "Volant,"* 5 Wall., 179.—This was the case of a neutral vessel sailing with neutral goods consigned to neutrals at Matamoras, Mexico, during the American Civil War.

The United States Supreme Court directed restitution of the vessel and cargo, saying that the latter consisted "in part of bales of confederate uniform cloth \* \* \* but there is no proof of unlawful destination."

See also *The Science*, 5 Wall., 178.

*The "Cheltenham,"* *Russian and Japanese Prize Cases*, vol. 1, p. 17.—In this case the Vladivostock Prize Court held that railway sleepers (ties) and beer were contraband when destined to a port held by the enemy.

See also *The Arabia*, id., p. 42, in which railway material consigned to Japan was condemned.

*The "Arabia,"* *Russian and Japanese Prize Cases*, vol. 1, p. 42.—Held by the Russian Supreme Court that flour was conditional contraband and liable to condemnation only if consigned to the enemy's government contractors, navy, army, fortresses, or naval bases.

*The "Calchas,"* *Russian and Japanese Prize Cases*, vol. 1, p. 118.—In this case the Russian Supreme Court held timber, going to a Japanese port, and which it appeared might be used for shipbuilding, or railway bridges, to be condemnable, since the owners had not proved its innocent destination.

The court further held that flour going to a Japanese port was not condemnable, since the owners had proved its innocent destination.

Rice held to be contraband of war when consigned to government contractor; otherwise when consigned to private parties.

*The "St. Kilda,"* *Russian and Japanese Prize Cases*, vol. 1, p. 188.—In its decision to the above effect, the Russian Supreme court said: "The expression 'naval ports or fortresses' implies \* \* \* places where military elements are concentrated exclusively or where they predominate" and

"It should also be borne in mind that the denial of any right to carry food supplies to Kobe and Yokohama would tend to the suspension during war times of their extensive peaceful and commercial operations, and of the rice trade in particular."

See also *The Ikhoua*, *Russian and Japanese Prize Cases*, vol. 1, p. 226, wherein wheat and rice were held not to be contraband, when destined to private persons.

*The "Prinsesse Marie," Russian and Japanese Prize Cases, vol. 1, p. 276.*—Iron and steel not suitable for construction or equipment of telegraphs, telephones, and railways were held not to be contraband when intended for peaceful purposes.

*The "Aggi," Russian and Japanese Prize Cases, vol. 2, p. 131.*—Coal was held not to be contraband when not destined for the enemy's army or navy.

*Cargo Ex "Hsiping," Russian and Japanese Prize Cases, vol. 2, p. 135, and Cargo Ex "Pehping," id., p. 164.*—Foodstuffs and beverages were condemned, having been captured on a neutral vessel and consigned to a port occupied as a Russian base depot. The court argued that since the articles in question were principally of a nature adopted for the requirements of Europeans and Americans, of whom, as non-combatants, there were very few in this port at the time, the goods must be held to be intended for the military use of the enemy immediately upon their arrival at the port.

*Cargo Ex "Hsiping," Russian and Japanese Prize Cases, vol. 2, p. 140.*—Silver coins were condemned when captured on board a neutral vessel and consigned to a port occupied as a Russian base depot. The finding of the court that these coins were intended for the use of the enemy appears to have been based very largely on the claimed fact that in the port in question (a Chinese one) Russian paper money had greatly depreciated, owing to Russian defeats in war, and had indeed almost ceased to circulate and therefore silver money had become indispensable for the Russian army.

*The "Aphrodite," Russian and Japanese Prize Cases, vol. 2, p. 240.*—Coal was held to be contraband of war, when of best quality, which is rarely used in the Far East, except for naval purposes, and destined for Vladivostock, the only Russian naval base in the East.

See also *The Wilhelmina*, id., p. 248, and other cases reported in that volume.

*The "Scotsman," Russian and Japanese Prize Cases, vol. 2, p. 256.*—Rice was held to be contraband when captured on a neutral vessel bound for an enemy naval base; there being no charter-party on board the vessel, which pursued an indirect course to the base in question, and the ship being insured at a heavy premium. Moreover, the charter-party, when produced, showed that the owners had a right to the use of an ice breaker free of charge, and all ice breakers in the port of destination belonged to the Russian Government.

*Cargo ex "Bawtry," Russian and Japanese Prize Cases, vol. 2, p. 270.*—The following articles were condemned as materials for railway construction when captured on board a neutral ship and destined for an enemy's port, used as a naval base and supply-depot: rails, fish plates, fittings, wheels and axles, axle boxes, containers, cars, point rails.

Telephones were also condemned as were the following articles as harness: spurs, stirrups, bits and chains.

*The "M. S. Dollar," Russian and Japanese Prize Cases, vol. 2, p. 284, and The "Wyefield," id., p. 291.*—Hay, barley and oats were condemned as contraband, when captured on a neutral vessel, and destined for an enemy's port, used as a naval base and supply depot.

*The "Paros," Russian and Japanese Prize Cases, vol. 2, p. 301.*—Telephone wire, rock salt, milk, butter, cheese and wheat were condemned as conditional contraband when captured on board a neutral vessel and destined for an enemy's port, used as a naval base and supply-depot.

*The "Tacoma," Russian and Japanese Prize Cases, vol. 2, p. 314.*—Salt beef was condemned as contraband when bound for an enemy's port, used as a naval station and supply depot, especially as it appeared that the beef has been purchased by an agent of contractors for the Russian army.

*Cargo ex "Lydia," Russian and Japanese Prize Cases, vol. 2, p. 367.*—Salt and table salt were condemned as provisions when captured on a neutral ship and destined for a port used as the enemy's coastal fortress and supply base.

*The "Antiope," Russian and Japanese Prize Cases, vol. 2, p. 389.*—Semi-refined American rock salt was condemned as contraband, when captured on a neutral vessel and destined for a Russian port, which was in close touch with a district of military importance. It was found by the Prize Court that the salt in question was intended for use in salting fish; that the ordinary demand for such fish was greatly diminished by the war but that the military demand had increased, and that "the carriage to that district at this period of an enormous quantity of salt must be held to be for the purpose of using it in the preparation of salted fish for consumption by the Russian forces."



CIRCUMSTANCES UNDER WHICH CONDITIONAL CONTRABAND NOT LIABLE TO CAPTURE—  
PROOF AS TO DESTINATION—EXCEPTION IN CASE OF COUNTRY HAVING NO SEABOARD.

Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture in cases where the enemy country has no seaboard.—*Declaration of London, Articles 35 and 36.*

As has been said above, the doctrine of continuous voyage is excluded for conditional contraband, which is only liable to capture when it is to be discharged in an enemy port. As soon as the goods are documented for discharge in a neutral port they can no longer be contraband, and no examination will be made as to whether they are to be forwarded to the enemy by sea or land from that neutral port. It is here that the case of absolute contraband is essentially different.

The ship's papers furnish complete proof as to the voyage on which the vessel is engaged and as to the place where the cargo is to be discharged; but this would not be so if the vessel were encountered clearly out of the course which she should follow according to her papers, and unable to give adequate reasons to justify such deviation.

This rule as to the proof furnished by the ship's papers is intended to prevent claims frivolously raised by a cruiser and giving rise to unjustifiable captures. It must not be too literally interpreted, for that would make all frauds easy. Thus it does not hold good when the vessel is encountered at sea clearly out of the course which she ought to have followed, and unable to justify such deviation. The ship's papers are then in contradiction with the true facts and lose all value as evidence; the cruiser will be free to decide according to the merits of the case. In the same way, a search of the vessel may reveal facts which irrefutably prove that her destination or the place where the goods are to be discharged is incorrectly entered in the ship's papers. The commander of the cruiser is then free to judge of the circumstances and capture the vessel or not according

to his judgment. To resume, the ship's papers are proof, unless facts show their evidence to be false. This qualification of the value of the ship's papers as proof seems self-evident and unworthy of special mention. The aim has been not to appear to weaken the force of the general rule, which forms a safeguard for neutral trade.

It does not follow that because a single entry in the ship's papers is shown to be false their evidence loses its value as a whole. The entries which can not be proved false retain their value.

The case contemplated is certainly rare, but has nevertheless arisen in recent wars. In the case of absolute contraband, there is no difficulty, since destination for the enemy may always be proved, whatever the route by which the goods are sent (art. 30). For conditional contraband the case is different, and an exception must be made to the general rule laid down in article 35, paragraph 1, so as to allow the captor to prove that the suspected goods really have the special destination referred to in article 33 without the possibility of being confronted by the objection that they were to be discharged in a neutral port.

Report of committee which drafted Declaration of London.

#### **Contra.**

In order to constitute the unlawfulness of the transportation of contraband, it is not necessary that the immediate destination of the ship and cargo should be to an enemy's country or port. If the goods are contraband and destined for the direct use of the enemy's army or navy, the transportation is illegal, and subject to the ordinary penalty.

Halleck, p. 576.

[For a statement of the settlement by Articles 30, 35, and 36 of the Declaration of London of the long-standing controversy on the question of "Continuous voyage," see the extract from Lawrence (pp. 716-719) under article 30, *supra*.]

\* \* \* Article 35 [of the Declaration of London] categorically rejects the doctrine of continuous voyages with regard to *conditional* contraband \* \* \*

However, in cases where the enemy country has no seaboard, article 36—in contradistinction to the provisions of article 35—expressly recognizes the doctrine of continuous voyages for *conditional* contraband also \* \* \*

Oppenheim, vol. 2, p. 506.

The general rule shall be that the destination of a ship is the destination of her cargo.

Japanese Regulations 1904, Article 15.

#### **Contra in part.**

In the case of a ship, the destination of which is not the enemy territory, should an intermediate port at which she calls during her voyage be within the enemy territory, or should there be a presumption that she is sailing to meet a ship of war or other ship of the enemy, her destination shall be held to be the enemy territory.

Japanese Regulations 1904, Article 16.

**Contra.**

In the case of a ship, the destination of which is not the enemy territory, whether she calls at that destination and discharges cargo or not, if there is reason to believe that the cargo in question is being conveyed to the enemy territory, her voyage shall be regarded as a continuous voyage, and her destination shall be held to have been, from the commencement, the enemy territory.

Japanese Regulations 1904, Article 17.

35. Articles of conditional contraband are subject to seizure only on board a ship which is on the way to the enemy country or a place held by the enemy or to the enemy forces and when these articles are not to be discharged in an intermediate neutral port, i. e. a port at which the ship must call before reaching any final destination.

36. When a ship has conditional contraband on board, the data in the ships papers concerning her further movements and the ports of discharge of her merchandise are to be accepted without reserve, unless it is clear that the ship has deviated from the course laid down in the ships papers, without sufficient justification, or facts are evident which establish beyond doubt that the data mentioned in the papers are false.

37. When the ships papers contain no data concerning the further movements of the ship, or leave it optional with her to touch at a hostile port, the captain may assume that she is on the way to a hostile port.

When the ships papers contain no data concerning the ports of discharge or articles of conditional contraband, or leave it optional with the ship to discharge these articles in an enemy port, the captain may assume—so far as the ship may or will touch at a hostile port, the articles in question are to be discharged in that port.

38. If the hostile territory has no sea coast, the provisions of No. 35 do not apply, and it is sufficient in such case for the conditions of 32 to be fulfilled, to justify the seizure of articles of conditional contraband.

German Prize Rules, 1909, Articles 35–38.

The articles called conditional contraband have not the character of contraband unless the vessel carrying them is proceeding towards the territory of the enemy or towards the territory occupied by him or towards his armed forces, and unless it is not to be discharged at an intervening neutral port.

Nevertheless, if the territory of the enemy has no seaboard, the above articles have the character of contraband by the sole fact of their own hostile destination even when the carrying vessel itself has a neutral destination.

The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

French Naval Instructions, 1912, sec. 41, 42, and 43.

Articles 35 and 36, Declaration of London, are substantially identical with sections 62 and 63, respectively, Austro-Hungarian Manual, 1913.

*The "Edward," 4 C. Rob., 68.*—This was the case of a neutral ship which sailed with a cargo of wines from Bordeaux, ostensibly for a neutral port, but was found hovering about an island on the French coast, and clearly out of the course for the neutral port in question.

Held that since the wines must be regarded as destined for a French port (because of the suspicious conduct of the vessel), they must be regarded as contraband as, presumably a necessary part of naval stores for the large naval expedition then preparing at Brest.

WHERE AND WHEN VESSEL-CARRYING GOODS LIABLE TO CAPTURE AS CONTRABAND MAY  
BE CAPTURED.

**A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination.**—*Declaration of London, Article 37.*

The vessel may be captured for contraband during the whole of her voyage, provided that she is in waters where an act of war is lawful. The fact that she intends to touch at a port of call before reaching the enemy destination does not prevent capture, provided that destination in her particular case is proved in conformity with the rules laid down in articles 30 to 32 for absolute, and in articles 33 to 35 for conditional contraband, subject to the exception provided for in article 36.

Report of committee which drafted Declaration of London.

It has always been universally recognised by theory and practice that a vessel carrying contraband may be seized by the cruisers of the belligerent concerned. \* \* \*

It must be specially observed that seizure for carriage of contraband is only admissible on the Open Sea and in the maritime territorial belts of the belligerents. Seizure within the maritime belt of neutrals would be a violation of neutrality.

. Oppenheim, vol. 2, pp. 506–507.

Vessels, whether neutral or otherwise, carrying contraband of war destined for the enemy, are liable to seizure and detention, unless treaty stipulations otherwise provide.

U. S. Naval War Code, 1900, Article 35.

When a ship carries articles which are subject to seizure as absolute or conditional contraband, she is liable to capture on the high seas or in the waters of the belligerents throughout the entire duration of her voyage, even when she has the intention to call at an intermediate port before reaching the hostile destination.

German Prize Rules, 1909, Article 39.

A vessel carrying articles liable to seizure as contraband may be seized or captured by you throughout the whole of its voyage, even if it has to touch at a port of call before reaching the enemy destination.

French Naval Instructions, 1912, sec. 48.

Article 37, Declaration of London, is substantially identical with section 18, Austro-Hungarian Manual, 1913.

CAPTURE FOR CARRYING CONTRABAND ON PREVIOUS VOYAGE PROHIBITED.

A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.—*Declaration of London, Article 38.*

A vessel is liable to capture for carrying contraband, but not for having done so.

Report of committee which drafted Declaration of London.

The contraband of war must be actually on board at the time the search is made.

Institute. 1882, p. 51.

In order that a vessel may be condemned because of being engaged in transportation prohibited in time of war, it is necessary:

\* \* \* \* \*

3. That the contraband be seized in the very act of being transported, or that it be found on board a vessel when the latter is stopped.

Institute, 1887, p. 76.

In order that a vessel may be condemned because of being engaged in transportation prohibited in time of war, it is necessary:

\* \* \* \* \*

4. That the ship be caught in the act.

Institute, 1896, pp. 142, 143.

The general rule as to contraband articles \* \* \* is, that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port.

Dana's Wheaton, pp. 645-646.

Accord, but with exception as to continuous voyage.

Where the contraband goods are not taken *in delicto*, in the actual prosecution of the outward voyage, and the return voyage is distinct and independent, the penalty is not generally held to attach, either upon the proceeds of the goods or on the ship upon her return voyage. But where they are both inseparably connected in their original plan, so as to form parts of a continuous voyage, the penalty is generally considered as attaching in every stage till its final completion. Such is the doctrine established by the decisions of the English admiralty, and seemingly admitted by the supreme court of the United States. Mr. Wheaton has questioned its soundness, but his objection, that *it extends the offense indefinitely*, is completely answered by the decisions themselves, which expressly limit the offense

and its penal consequences to completion of the *entire* voyage. Ortolan contests this rule of the continuation of the offense during the return voyage, on the ground that the ship should, in all cases, be exempted from any penalty, and the confiscation confined to the contraband articles. He has supported his doctrine by strong and logical arguments, but, however correct it may be in theory, it is not supported by the practice of the great maritime powers of the world. The general rule of exemption is, undoubtedly, well established, but the exceptions indicated are supported by good authorities, and generally admitted in practice.

Halleck, p. 574; Wheaton on Captures, p. 183; Ortolan, *Dip. de la Mer*, liv. 3, ch. 6.

On the other hand, as a consequence of the doctrine that the goods are seized because of their noxious qualities, and not because of the act of the person carrying them, it is held that so soon as the forbidden merchandise is deposited, the liability which is its outgrowth is deposited also, and that neither the proceeds of its sales can be touched on the return voyage, nor can the vessel, although previously affected by her contents, be brought in for adjudication. Some cases have however been decided in the English courts which go further. A contraband cargo, for example, having been taken to Batavia, with fraudulent papers and a fraudulent destination to Tranquebar, the return cargo was condemned on the ground that 'in distant voyages the different parts are not to be considered as two voyages, but as one entire transaction, formed upon one original plan, conducted by the same persons, and under one set of instructions, *ab ovo usque ad mala*.' And in a case in which contraband was carried by false documents and suppression to the Isle of France, whence the vessel went in ballast to Batavia, and subsequently sailed to various ports with more than one cargo before capture took place, it was even held that 'it is by no means necessary that the cargo should have been purchased by the proceeds of the contraband' carried on the outward voyage. The doctrine of these cases is not approved of by Wheaton or by foreign jurists; and, while undoubtedly severe, it does not appear to be a necessary deduction from the general principles governing the forfeiture of contraband cargoes.

Hall, pp. 695, 696; *The Imina*, 3 C. Rob., 168; *The Nancy*, id. 126; *The Margaret*, 1 Acton, 335.

The time during which the penalty for the carriage of contraband is enforceable is, in general, from the moment of the ship's quitting port with the goods having a hostile destination on board to that when the goods are unloaded. On the return voyage the ship is free. But where a ship succeeded in carrying contraband to a hostile destination with false papers, and was taken on the return voyage, Lord Stowell and Sir William Grant condemned her with her return cargo, whether it had been purchased with the proceeds of the outward contraband cargo or several intermediate transactions had been interposed; and the Admiralty *Manual* approves. Gessner on the other hand strongly objects, and in my judgment he is right. It is contended that in such cases the offence of the ship is not deposited with the goods, but the offence of the ship is not punished on the

return voyage when it consists in the shipowner's being privy to the carriage of the contraband, and it is difficult to see how the use of false papers, though a graver offence, brings in a different principle.

Westlake, vol. 2, p. 292.

But seizure is allowed only so long as a vessel is *in delicto*, which commences when she leaves the port of starting and ends when she has deposited the contraband goods, whether with the enemy or otherwise. The rule is generally recognised, therefore, that a vessel which has deposited her contraband may not be seized on her return voyage. British and American practice, however, has hitherto admitted one exception to this rule—namely, in the case in which a vessel has carried contraband on her outward voyage with simulated and false papers. But no exception has been admitted by the practice of other countries. Thus, when in 1879, during war between Peru and Chili, the German vessel *Luxor*, after having carried a cargo of arms and ammunition from Monte Video to Valparaiso, was seized in the harbour of Callao, in Peru, and condemned by the Peruvian Prize Courts for carrying contraband, Germany interfered and succeeded in getting the vessel released. \* \* \*

The Declaration of London \* \* \* does not recognize the above mentioned British exception.

Oppenheim, vol. 2, pp. 506–507.

A vessel which carries Contraband Goods becomes liable to Detention from the moment of quitting port with the Goods on board, and continues to be so liable until she has deposited them. After depositing them, the Vessel, in ordinary cases, ceases to be liable. As a general rule, therefore, a Commander should not detain a Vessel for carrying Contraband Goods unless he finds them actually on board. But Simulated Papers are an aggravation of the offence. If, therefore, a Commander meets with a Vessel on her return Voyage, and ascertains that on her outward Voyage she carried Contraband Goods with Simulated Papers, he should detain her; and the fact that the return Cargo has not been purchased by the proceeds of the outward Contraband Cargo makes no difference.

Holland, pp. 23 and 24.

Seizure can not be made on the ground of a previous carrying of contraband which has already been fully completed.

German Prize Rules, 1909, Article 40.

You will not seize a ship by reason of carriage of contraband on a previous occasion and in point of fact at an end.

French Naval Instructions, 1912, sec. 47.

Article 38, Declaration of London, is substantially identical with section 19, Austro-Hungarian Manual, 1913.

#### Contra.

*The "Margaret," 1 Acton, 333.*—This was the case of a vessel which, on her outward voyage from Baltimore, carried contraband goods to a French colony. Subsequently she touched at various other ports and was captured on her return voyage.



Held, that where a vessel carries contraband on the outward voyage, she is liable to condemnation on the return voyage even though the return cargo was not purchased with the proceeds of the contraband.

Ship and cargo were both condemned.

*The "Imina," 3 C. Rob., 167.*—This was a case of a vessel originally destined for the hostile port of Amsterdam but whose destination was changed, before capture, to the neutral port of Embden.

The vessel was restored, and the court said: "\* \* \* if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage [to a hostile port], the penalty is not now generally held to attach."

Contra, if bad faith characterizes the previous voyage.

*The "Nancy," 3 C. Rob., 126.*—In this case the owners of the cargo appeared to have shipped contraband articles to an enemy's port on the outward voyage, with papers showing a false destination and instructions to conceal the real destination.

Held that the claimant should not be permitted to give further proof of the returned cargo, which was purchased with the proceeds of the contraband articles. The cargo was condemned.

See, to the same effect, *The Rosalie and Betty*, 2 C. Rob., 343.

#### Exception.

--*The "Ariel," 3 C. Rob., 122.*—This was the case of an alleged Danish vessel which on her outward voyage to Batavia carried contraband goods under circumstances tending to create the suspicion that she was under Dutch control. She was seized on her return voyage and her cargo, which was the proceeds of the outward cargo, was condemned.

The court held that in distant voyages, like those to the East Indies, conducted as this voyage had been, in a suspicious manner, the rule should not apply, that in cases of contraband, the return voyage should not be connected with the outward voyage.

Accord, but with exception.

*Carrington et al. v. The Merchants Insurance Co., 8 Peters, 495.*—The court said: "But when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband. And the same rule would seem by analogy to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established that it exists only in favor of neutrals who conduct themselves with fairness and good faith in the arrangements of the voyage. If, with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised,

and the vessel sails under false papers, and with a false destination, the mere deposit of the contraband in the course of the voyage is not allowed to purge away the guilt of the fraudulent conduct of the neutral."

See also, to same effect, *The Franklin*, 3 C. Rob., 217; *The Christianberg*, 6 C. Rob., 376; *The Rosalie* and *The Elizabeth*, 4 C. Rob., note to table of cases; *The Baltic*, 1 Acton, 25.

*The "Allanton," Russian and Japanese Prize Cases, vol. 1, p. 1.*—This was a case of a British ship which carried contraband (coal) to a Japanese port, and was captured while on a voyage *from* that port to Singapore.

Held by the Russian Supreme Court that the delivery of the contraband by the vessel on her first voyage was not sufficient ground for condemnation of the cargo shipped from the Japanese port to Singapore.

*The "Eastry," Russian and Japanese Prize Cases, vol. 2, p. 299.*—This was a case of a neutral vessel which on a former occasion had carried a cargo of contraband to Vladivostock and was captured while carrying a cargo of coal to a neutral port.

Held that as the vessel was not carrying contraband at the time of capture she should be released.

CONTRABAND GOODS LIABLE TO CONDEMNATION.

**Contraband goods are liable to condemnation.**—*Declaration of London, Article 39.*

\* \* \* nor shall it be lawful to sell, exchange or alienate the cargo or any part thereof, until legal process shall have been had against the prohibited merchandizes, and sentence shall have passed declaring them liable to confiscation.

Treaty of Amity and Commerce, concluded between the United States and Sweden, April 3, 1783, Article XIII.

**Contra, but with right of preemption.**

And in the same case of one of the contracting parties being engaged in war with any other Power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination.

Treaty of Amity and Commerce, concluded between the United States and Prussia, July 11, 1799, Article XIII.

The articles of contraband, before enumerated and classified, which may be found in a vessel bound for an enemy's port, shall be subject to detention and confiscation. \* \* \*

Treaty of Peace, Amity, Navigation, and Commerce concluded between the United States and New Granada (Colombia). December 12, 1846, Article XIX.

The articles of contraband before enumerated and classified which may be found in a vessel bound to an enemy's port shall be subject to detention and confiscation. \* \* \*

Treaty of Peace, Friendship, Commerce, and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XIX.

\* \* \* contraband transported to an enemy destination shall be confiscated.

Institute, 1887, p. 76.

Contraband \* \* \* shall be confiscated.

Institute, 1896, p. 143.

When goods are once clearly shown to be contraband, confiscation to the captor is the natural consequence. This is the practice in all cases, as to the article itself, excepting provisions; and as to them, when they become contraband, the ancient and strict right of forfeiture is softened down to a right of pre-emption on reasonable terms. But, generally, to stop contraband goods, would, as Vattel observes, prove an ineffectual relief, especially at sea. The penalty of confiscation is applied, in order that the fear of loss might operate as a check on the avidity for gain, and deter the neutral merchant from supplying the enemy with contraband articles. The ancient practice was, to seize the contraband goods, and keep them, on paying the value. But the modern practice of confiscation is far more agreeable to the mutual duties of nations, and more adapted to the preservation of their rights. It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself.

Kent, Vol. I, pp. 147-148; Vattel, b. 3, c. 7, sec. 113.

If further inquiry shows that the owner intended to deliver them [goods capable of direct military as well as civil use] directly into military hands for military use, he loses them, not simply from their inherent contraband nature, but by reason of his own unneutral act. Although nothing be developed as to the owner's intent, yet if the condition of the port of destination, or the character and state of the war, make it satisfactorily appear that they will, in all probability, go directly into military use, or directly tend to relieve an enemy from hostile pressure, the right of the belligerent to intercept them may be exercised solely for those reasons. In such case, it rests on his right to intercept aid to his enemy, though the act of the neutral carrier is not unlawful; and the captor, therefore, pays the neutral his freight.

Dana's Wheaton, Note 226.

The noxious articles themselves, (if decided to be *contraband*,) are invariably condemned, and no defense or plea can save them from confiscation, when their character as contraband, and their destination to a hostile port or country, are admitted or established.

Halleck, p. 570.

#### Preemption.

The ancient custom of *preëmption*, by the belligerent, of the property of the subjects of another state, as practiced about the middle of the seventeenth century, had a much wider operation and very different meaning than is now attributed to it. By the French ordonnance of 1584, article sixty-nine, contraband was subjected, not to *confiscation*, but to *preëmption*. But, according to the modern use of this term, it is applied to articles not subject to confiscation, as *contraband* in themselves, but being *ambigui usus* are made subject to seizure, and to be condemned to the use of the belligerent, he paying their value with a reasonable mercantile profit,—which, by the practice of the British prize courts, is usually fixed at ten per cent. If the goods so seized are contraband, the carrying of them is

a criminal act, punishable by confiscation or any milder penalty which the belligerent may see fit to impose; but if not contraband, by the law of nations, they are not liable to preëmption. The question, therefore, resolves itself into one of contraband, upon which opinions are somewhat divided.

But the British admiralty, and especially Sir William Scott, went much further, and sustained the capture of provisions which were not even *probably* destined to military use, not, indeed, confiscating as *contraband of war* on the ground of their being *ambigui usus*, but condemning them to the use of the British government, on the payment of a price equivalent to their value, or rather, their cost and the specified mercantile profit of ten per cent. A similar rule of *preëmption* was applied by great Britain to certain *native commodities* of neutral states, found in neutral vessels, and required by her for naval purposes. In some cases, where this rule of preëmption, or pretended right of purchase, was exercised, it was not claimed that the goods so captured and condemned to a forced sale, were contraband, even on the ground of being *ambigui usus*; but the right to preëempt them was claimed, because "the *ancient* practice of Europe, or at least, of several maritime states of Europe, was, to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them." It was not pretended, as, indeed, it could not have been, that the claim thus *asserted* by some of the maritime states of Europe a century before, was generally admitted, and adopted as a rule of international law, or that the practice ever had received any such sanction as to make it binding upon neutrals.

The arguments adduced in favor of the British right of *preëmption* failed to convince its opponents of its justness or legality, and its enforcement was, at the time, most strenuously opposed by the government of the United States and the neutral powers of Europe. Nor did this opposition cease with the war in which the rule had originated, or, at least, been called into operation. Since then, text-writers have most emphatically denied the legality of the rule, and successfully attacked the arguments by which it was attempted to be defended. Some British writers still advocate it as a principle of law, but there is little probability that in any future war the British government will attempt to exercise the right of preëmption, except upon goods manifestly contraband of war.

Halleck, pp. 588-590.

### Preemption.

In strictness every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to preemption only, which by the English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit, usually calculated at ten per cent on the amount. This mitigation of extreme belligerent privilege is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband.

Hall. p. 690. 691.

Till lately there was a great divergence of opinion between maritime powers as to the penalty for carrying contraband of war. They were agreed that the contraband goods should be confiscated, though even on this point there had been at least one treaty which provided for temporary sequestration only.

Lawrence, p. 721; Treaties of the United States, p. 903; British Parliamentary Papers, Miscellaneous, No. 5 (1909), pp. 70-73.

In former times neither in theory nor in practice have similar rules been recognised with regard to the penalty of carriage of contraband. The penalty was frequently confiscation not only of the contraband cargo itself, but also of all other parts of the cargo, together with the vessel. Only France made an exception, since according to an *ordonnance* of 1584 she did not even confiscate the contraband goods themselves, but only seized them against payment of their value, and it was not until 1681 that an *ordonnance* proclaimed confiscation of contraband, but with exclusion of the vessel and the innocent part of the cargo. During the seventeenth century this distinction between contraband on the one hand, and, on the other, the innocent goods and the vessel was clearly recognised by Zouche and Bynkershoek, and confiscation of the contraband only became more and more the rule, certain cases excepted.

Oppenheim, vol. 2, p. 508; Wheaton, *Histoire des Progrès du Droit des gens en Europe* (1841), p. 82.

During the eighteenth century the right to confiscate contraband was frequently contested, and it is remarkable as regards the change of attitude of some States that by article 13 of the Treaty of Friendship and Commerce concluded in 1785 between Prussia and the United States of America all confiscation was abolished. This article provided that the belligerent should have the right to stop vessels carrying contraband and to detain them for such length of time as might be necessary to prevent possible damage by them, but such detained vessels should be paid compensation for the arrest imposed upon them. It further provided that the belligerent could seize all contraband against payment of its full value, and that, if the captain of a vessel stopped for carrying contraband should deliver up all contraband, the vessel should at once be set free. I doubt whether any other treaty of the same kind was entered into by either Prussia or the United States. And it is certain that, if any rule regarding penalty for carriage of contraband was generally recognised at all, it was the rule that contraband goods could be confiscated.

Oppenheim, vol. 2, pp. 508-509; Martens, R. IV, p. 42.

Contra as to conditional contraband, but with right of preemption or angary.

As regards conditional contraband, those States which made any distinction at all between absolute and conditional contraband, as a rule confiscated neither the conditional contraband nor the carrying vessel, but seized the former and paid for it. According to British practice hitherto prevailing, freight was paid to the vessel, and the usual compensation for the conditional contraband was the cost price plus 10 per cent. profit. States acting in this way asserted a right

to confiscate conditional contraband, but exercised pre-emption in mitigation of such a right. Those Continental writers who refused to recognise the existence of conditional contraband, denied, consequently, that there was a right to confiscate articles not absolutely contraband, but they maintained that every belligerent had, according to the so-called right of angary, a right to stop all such neutral vessels as carried provisions and other goods with a hostile destination of which he might have made use and to seize such goods against payment of their full value.

Oppenheim, vol. 2, p. 510; Holland, Prize Law, sec. 84.

#### **Preemption of conditional contraband.**

The Institute of International Law \* \* \* proposed [at its meeting at Venice in 1896] a compromise regarding articles of ancipitous use. Although the rules state that those articles may not be considered contraband, they nevertheless give the choice to a belligerent of either exercising pre-emption or seizing and temporarily retaining such articles against payment of indemnities.

Oppenheim, vol. 2, pp. 510-511.

#### **Preemption.**

The question of pre-emption of conditional contraband is not mentioned by the Declaration of London. There is, however, nothing to prevent the several maritime Powers from exercising pre-emption in mitigation of their right of confiscation; the future must show whether or no they will be inclined to do this.

Oppenheim, vol. 2, pp. 512-513.

It will be no excuse for carrying Contraband that the Master is or pretends to be ignorant of the nature of the Goods on board his Vessel.

It will be no excuse that the Master was compelled to carry the Contraband Goods by Duress of the Enemy.

It will be no excuse that permission has been given for the Vessel to trade with the Enemy in innocent articles.

It will be no excuse that the Vessel is at the same time engaged in carrying Despatches for its own Government.

A treaty provision that Free Ship shall make Free Goods does not sanction the carrying of Contraband.

The character of the Port from which Contraband Goods are shipped, whether British, Allied, Neutral, or Hostile, makes no difference.

Holland, pp. 22 and 23.

The Penalty for carrying Goods absolutely Contraband is, in general, the confiscation of such Goods.

Holland, p. 24.

#### **Preemption.**

The Carriage of Goods conditionally Contraband, and of such absolutely Contraband Goods as are in an unmanufactured state, and are the produce of the country exporting them, is usually followed

only by the Preemption of such Goods by the British Government, which then pays freight to the Vessel carrying the Goods.

Holland, p. 24.

The Penalty for carrying Contraband Goods with Simulated Papers, or in disregard of express stipulations by Treaty, is confiscation not only of the Contraband Goods, but also of the Vessel, and any interest which her Owner has in the rest of the Cargo.

Holland, p. 25.

Articles which are contraband of war, \* \* \* shall be condemned.

Japanese Regulations 1904. Article 43.

In the cargo, subject to confiscation are—

- (a) Articles which may be seized as absolute or relative contraband.
- (b) Merchandise belonging to their owner.

German Prize Rules, 1909, Article 42.

Article 39, Declaration of London, is substantially identical with section 61, Austro-Hungarian Manual, 1913.

**Exception as to produce of the claimant's country—preemption.** \*

*The "Sarah Christiana," 1 C. Rob., 238.*—The court said: "In the practice of this court there is a relaxation of these articles (pitch and tar), being the produce of the claimant's country; and it has been deemed a harsh exercise of a belligerent right to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce. But in the same practice this relaxation is understood with a condition, that it may be brought in, not for confiscation, but for preemption; no unfair compromise, as it should seem, between the belligerent's rights, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities though immediately subservient to the purposes of hostility. To entitle the party to the benefit of this rule a perfect *bona fides* on his part is required."

**Preemption of produce of carrying country.**

*The "Maria," 1 C. Rob., 340, 372.*—In this case the court said that contraband goods, [the produce of the country which carried them] bound to an enemy's port, are clearly subject to be applied "to your own use, making a just pecuniary compensation for them."

**Exception as to goods preempted.**

*The "Haabet," 2 C. Rob., 175.*—The court said: "It is a mitigated exercise of war on which any purchase is made, and no rule has established, that such a purchase shall be regulated exactly upon the same terms of profit which would have followed the adventure, if no such exercise of war had intervened; it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expenses which he has incurred. \* \* \* But certainly the capturing nation



does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors, for these are not unjust captures, but authorized exercises of the right of war."

See further, *The Staat Embden*, 1798, 1 C. Rob., 27; *The Ringende Jacob*, 1798, 1 C. Rob., 89; *The Apollo*, 1802, 4 C. Rob., 159; *The Christiana Maria*, 1802, 4 C. Rob., 166; *The Twice Juffrowen*, 1802, 4 C. Rob., 242; *The Evert*, 1803, 4 C. Rob., 354.

*The "Brutus,"* 5 C. Rob., 331, n.—In this case, "a ship recently built for war, as not fit for commerce, and going to the Havannah to be sold" was condemned as contraband.

See also, *The Richmond*, 5 C. Rob., 325.

**Preemption not a recognized rule of international law.**

*Cargo Ex "Roseley," Russian and Japanese Prize Cases*, vol. 2, p. 235.—The Higher Prize Court (Japanese) said: "Thirdly, it is a universal principle of International Law that all contraband may be condemned. Capture subject to compensation, preemption, or condemnation with compensation, which the appellant hopes for, must be regarded as no more than a special custom or theory, or a practice agreed upon in a special treaty, and cannot yet be regarded as a rule of International Law."

CIRCUMSTANCES UNDER WHICH VESSEL CARRYING CONTRABAND MAY BE CONDEMNED.

**A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.**—*Declaration of London, Article 40.*

It was universally admitted that in certain cases the condemnation of the contraband is not enough, and that the vessel herself should also be condemned, but opinions differed as to what these cases were. It was decided that the contraband must bear a certain proportion to the total cargo. But the question divides itself into two parts: (1) What shall be the proportion? The solution adopted is the mean between those proposed, which varied from a quarter to three-quarters. (2) How shall this proportion be reckoned? Must the contraband form more than half the cargo in volume, weight, value, or freight? The adoption of a single fixed standard gives rise to theoretical objections, and also to practices intended to avoid condemnation of the vessel in spite of the importance of the cargo. If the standard of volume or weight is adopted, the master will ship innocent goods, occupying space, or of weight, sufficient to exceed the contraband. A similar remark may be made as regards the standard of value or freight. The consequence is that in order to justify condemnation, it is enough that the contraband should form more than half the cargo by any one of the above standards. This may seem harsh; but, on the one hand, any other system would make fraudulent calculations easy, and, on the other, the condemnation of the vessel may be said to be justified when the carriage of contraband formed an important part of her venture—a statement which applies to all the cases specified.

Report of Committee which drafted Declaration of London.

**Contra.**

\* \* \* saying [saving?] nevertheless as well the ships themselves  
\* \* \* which by virtue of this present treaty are to be esteemed free, and which are not to be detained on pretence of their having been loaded with prohibited merchandize, and much less confiscated as lawful prize.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, Article XIII.

**Contra.**

The articles of contraband, before enumerated and classified, which may be found in a vessel bound for an enemy's port, shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship, that the owners may dispose of them as they see proper.

Treaty of Peace, Amity, Navigation and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XIX.

**Contra.**

The articles of contraband before enumerated and classified which may be found in a vessel bound to an enemy's port shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship, that the owners may dispose of them as they see proper.

Treaty of Peace, Friendship, Commerce, and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XIX.

The prize courts cannot condemn enemy or neutral prizes except on the following grounds:

1. Prohibited transportation in time of war; \* \* \*

Institute, 1887, p. 76.

In order that a vessel may be condemned because of being engaged in transportation prohibited in time of war, it is necessary:

1. That the transportation be to an enemy destination;
2. That the object transported be itself prohibited, that is, contraband, or conditional contraband, of war;
3. That the contraband be seized in the very act of being transported, or that it be found on board a vessel when the latter is stopped.

Institute, 1887, p. 76.

**Contra, to some extent.**

The vessel transporting them [official correspondence and contraband to an enemy destination] shall not be condemned unless:

1. It offers resistance;
2. It transports enemy troops;
3. If the cargo in course of transportation to an enemy destination is composed principally of provisions for the war vessels or troops of the enemy.

Institute, 1887, p. 77.

In order that a vessel may be condemned because of being engaged in transportation prohibited in time of war, it is necessary:

1. That the shipment of contraband be destined for a belligerent;
2. \* \* \*
3. That the object transported be itself prohibited.
4. That the ship be caught in the act.

Institute, 1896, pp. 142, 143.

**Contra.**

The vessel transporting them [contraband] shall not be condemned unless:

1. It offers resistance;
2. It transports illegally agents, soldiers or dispatches for a belligerent.

Institute, 1896, p. 143.

**Contra.**

\* \* \* the American Congress, in 1775, \* \* \* declared, that all vessels, to whomsoever belonging, carrying provisions or other necessities to the British army or navy within the colonies, should be liable to seizure and confiscation.

Kent, vol. 1, p. 146; Journals of the Confederation Congress, 1, 241.

**Contra.**

By the ancient law of Europe, the ship, also, was liable to condemnation; and such a penalty was deemed just, and supported by the general analogies of law; for the owner of the ship had engaged it in an unlawful commerce, and contraband goods are seized and condemned *ex delicto*. But the modern practice of the courts of admiralty, since the age of Grotius, is milder; and the act of carrying contraband articles is attended only with the loss of freight and expenses, unless the ship belongs to the owner of the contraband articles, or the carrying of them has been connected with malignant and aggravating circumstances; and among those circumstances, a false destination and false papers are considered as the most heinous. In those cases, and in all cases of fraud in the owner of the ship, or in his agent, the penalty is carried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship, and the innocent parts of the cargo. This is now the established doctrine; but it is sometimes varied by treaty, in like manner as all the settled principles and usages of nations are subject to conventional modification.

Kent, vol. 1, p. 149.

**Contra.**

In general, where the ship and cargo do not belong to the same person, the contraband articles only are confiscated, and the carrier-master is refused his freight, to which he is entitled upon innocent articles which are condemned as enemy's property. But where the ship and the innocent articles of the cargo belong to the owner of the contraband, they are all involved in the same penalty. And even where the ship and the cargo do not belong to the same person, the carriage of contraband, under the fraudulent circumstances of false papers and false destination, will work a confiscation of the ship as well as the cargo. The same effect has likewise been held to be produced by the carriage of contraband articles in a ship, the owner of which is bound by the express obligation of the treaties subsisting between his own country and the capturing country, to refrain from carrying such articles to the enemy. In such a case, it is said that the ship throws off her neutral character, and is liable to be treated at once as an enemy's vessel, and as a violator of the solemn compacts of the country to which she belongs.

Dana's Wheaton, pp. 638-644.

**Contra.**

It would seem that neutral vessels carrying contraband were, in early times, treated as wrong-doers, and deemed subject to forfeiture. \* \* \* Some relics of this practice remain. If the contraband cargo belongs to the owner of the vessel, the vessel is condemned. So, if the neutral vessel is bound by a treaty of her own country to abstain from the act in question, the vessel is condemned for the act, though the cargo be not the property of the owner of the vessel \* \* \*. By the present practice of nations, if the neutral has done no more than carry goods for another which are in law contraband, the only penalty upon him is the loss of his freight, time, and expenses. \* \* \* But, if she has no relations with the enemy's government, and, as a private merchant-vessel, is carrying

goods on private account, as merchandise, to the enemy's ports, to be put into the market there, or delivered into private hands, she is not, as the practice is now settled, liable to condemnation, whatever be the character of her cargo. It may be gunpowder, or provisions destined to a port hard pressed by siege. Her object is commercial; and the adapting of her cargo to the demands of its port of destination is allowed now to be a fair commercial enterprise. The probability, however great, that the gunpowder will at once or at last come into the hands of the enemy's government, or be otherwise used in war, and the chance that the provisions, whether they go into government hands or not, may enable the inhabitants the longer to support the siege,—none of these considerations make the enterprise contraband. The reason for the rule is that the capital and industry of the world are deeply and permanently involved in making, raising, and transporting for sale or consumption all articles, whether usable in war or not: and articles which all courts, treaties, and writers admit to be always contraband when destined to an enemy's port, are still also articles of utility and even necessity in peace; and in their production and transportation the capital and industry of the world are permanently involved. Gunpowder, for instance, smaller fire-arms, and even cannon, are necessary for peaceful purposes; and, if from these extreme instances, we pass through the scarcely distinguishable degrees of articles *incipit usûs*, it becomes apparent how strong and general is the motive for resisting restrictions upon this trade. The interests of peace and commerce, on the one hand, and those of war, on the other, have, in the conflict of their forces, rested at a practical line of settlement. The interests of peace have prevailed so far as to permit the carrier to transport contraband goods, subject to no other penalty than the loss of his commercial enterprise,—i. e., his freight and expenses; while the interests of war have prevailed so far as to permit the belligerent to stop the contraband goods on their passage, and convert them to his own use. The advantage of this is, that the carrying-trade of the world may go on, subject to an ascertainable risk, which may be provided for by contract, and guarded against by insurance; and producers and merchants can continue their business and procure transportation without criminality, taking the risk of the capture and condemnation of noxious articles. At the same time, the belligerents have the further security of being able to condemn all the interests involved, whether vessel or cargo, if there have been fraudulent practices, or hostile service.

Dana's Wheaton, Note 230.

#### Contra.

By the ancient laws of war, as established by the usages of European nations, the contraband cargo affected the ship, and involved it in the sentence of condemnation. The justice of this rule is vindicated by Bynkershoek and Heineccius, and it cannot be said that the penalty was unjust in itself, or unsupported by the analogies of the law. Grotius does not particularly discuss the case of the ship carrying contraband, but alludes to the subject in very general terms. Soon after this time, a relaxation began to be introduced into treaties,

but this relaxation, at first, applied only to cases in which the owner of the vessel might be supposed to be a stranger to the transaction. Subsequently, the stipulation in treaties became more general, although the relaxation was directed, in its particular application, as well as in its origin, only to such cases as afford a presumption that the owner was innocent, or the master deceived.

By the modern practice of the prize courts of England and the United States, and not opposed, it is believed, by other nations, a milder rule has been adopted, and the carrying of articles contraband of war is now attended only with the loss of freight and expenses, except where the ships belong to the owner of the contraband cargo, or where the simple misconduct of carrying contraband articles, is connected with other circumstances which extend the offense to the ship also. Sir William Scott says, "Anciently, the carrying of contraband did, in ordinary cases, affect the ship, and although a relaxation has taken place, it is a relaxation, the benefit of which can only be claimed by fair cases. The aggravation of fraud justifies additional penalties."

Where the transportation of the contraband articles is prohibited by the stipulations of a treaty, to which the government of the neutral ship-owner is a party, the forfeiture of the freight is extended to the ship, on the ground that the criminality of the act is enhanced by the violation of the additional duty imposed by the treaty.

Halleck, pp. 571, 572.

#### **Contra.**

The ordinary penalty of carrying articles contraband of war, is the confiscation of the goods and the loss of the freight and expenses to the ship. This penalty is not to be averted by the allegation that the owners or master were ignorant of the true nature of the articles, or that, by the threat or violence of the enemy, they were compelled to receive and transport them. Such excuses, if allowed, would be constantly urged, and by robbing the prohibition of contraband of its penal character, would convert it into a mere nugatory threat.

Halleck, p. 573.

#### **Contra.**

The injuriousness to a belligerent of contraband trade by a neutral, results from the nature of the goods conveyed, and not from the fact of transport. This distinction prevents the penalty which affects contraband merchandise from being extended as a general rule to the vessel in which it is. \* \* \*

If however the ship and the cargo belong to the same owners, or if the owner of the former is privy to the carriage of the contraband goods, the vessel is involved in their fate.

Hall, pp. 692, 693.

#### **Contra.**

The [British] Admiralty *Manual* of 1888 further deals with [the penalty for carrying contraband goods] as follows.

83. The vessel which carries [contraband] goods, if not owned by the owner of such goods, is not confiscated but forfeits her freight for such goods and all right to expenses the result of her detention.

85. The penalty for carrying contraband goods with simulated papers, or in disregard of express stipulations by treaty, is confiscation not only of the contraband goods but also of the vessel, and of any interest which her owner has in the rest of the cargo.

87. A vessel which is herself contraband is liable to be confiscated, together with such part of her cargo as belongs to her owner.

The vessel is also confiscated if she resisted capture or search, or if her owner was privy to the carriage of the contraband goods though not their owner. She is confiscable in Germany and Denmark if all her cargo, in France if three-fourths of her cargo, are contraband; by the Italian code of mercantile marine when any part is confiscable contraband; \* \* \*

Westlake, vol. 2, p. 291.

Till lately there was great divergence of opinion between maritime powers as to the penalty for carrying contraband of war.  
\* \* \*

There was also a general agreement that in certain circumstances the ship might be condemned as well as the goods. But few states held the same opinions as to what those circumstances were. Some powers, such as Great Britain, the United States, and Japan, looked chiefly to ownership, and condemned the vessel when she belonged to the proprietor of the noxious goods. Others, like France, Germany, and Russia, laid most stress on the proportion between the noxious goods and the rest of the cargo. Other tests, or combinations of tests, were sometimes used. In fact the Declaration of London has delivered the civilised world from a diversity which was as dangerous as it was confusing.

Lawrence, pp. 721, 722; Treaties of the United States, p. 903; British Parliamentary Papers, Miscellaneous, No. 5 (1909), pp. 70-73.

\* \* \* the practice of States varied much regarding the question as to whether the vessel herself and innocent cargo carried by her could be confiscated. For beyond the rule that absolute contraband could be confiscated, there was no unanimity regarding the fate of the vessel and the innocent part of the cargo. Great Britain and the United States of America hitherto confiscated the vessel when the owner of the contraband was also the owner of the vessel; they also confiscated such part of the innocent cargo as belonged to the owner of the contraband goods; they, lastly, confiscated the vessel, although her owner was not the owner of the contraband, provided he knew of the fact that his vessel was carrying contraband, or provided the vessel sailed with false or simulated papers for the purpose of carrying contraband. Some States allowed such vessel carrying contraband as was not herself liable to confiscation to proceed with her voyage on delivery of her contraband goods to the seizing cruiser, but Great Britain and other States insisted upon the vessel being brought before a Prize Court in every case.

Oppenheim, vol. 2, pp. 509-510. Holland Prize Law, secs. 82-87; Calvo, V, sec. 2779.

#### Contra.

The Carriage of Goods conditionally Contraband, and of such absolutely Contraband Goods as are in an unmanufactured state, and

are the produce of the country exporting them, is usually followed only by the Preemption of such Goods by the British Government, which then pays freight to the Vessel carrying the Goods.

Holland, p. 24.

The Penalty for carrying Contraband Goods with Simulated Papers, or in disregard of express stipulations by Treaty, is confiscation not only of the Contraband Goods, but also of the Vessel, and any interest which her Owner has in the rest of the Cargo.

Holland, p. 25.

#### **Contra in part.**

Merchant-vessels of a neutral nationality are liable to confiscation as prizes in the following cases:—

(1) When such vessels are found conveying to the enemy or to an enemy's port—

(a) Articles and stores required for shooting with fire-arms, or objects or substances used for causing explosions, whatever the amount of such things may be;

(b) Other articles of contraband of war amounting, in bulk or weight, to more than half of the entire cargo;

(c) \* \* \* provided that in all these cases it is not proved that the masters of the vessels concerned were unaware of the declaration of war;

\* \* \* \* \*

Russian Regulations, 1895, Article 11.

#### **Contra, by implication.**

If the owner of the ship carrying the articles which are contraband of war, and the owner of the articles which are contraband of war are one and the same person, the ship shall be condemned.

Japanese Regulations 1904, Article 43.

#### **Contra, by implication.**

A ship carrying, by the employment of fraudulent devices, articles which are contraband of war, and that portion of her cargo which belongs to the owner of the contraband, shall be condemned.

Japanese Regulations 1904, Article 44.

Ships which are themselves contraband are subject to confiscation. A ship brought in because of carrying contraband is subject to capture when the contraband, in value, weight, volume, or freight charges, constitutes more than half the cargo.

German Prize Rules, 1909, Article 41.

You will capture a vessel carrying contraband if this contraband forms, either by value, weight, volume, or freight, more than half of the cargo.

You will limit yourself to seizing the vessel carrying contraband if this contraband is in a less proportion than that indicated above.

French Naval Instructions, 1912, secs. 49 and 50.

Article 40, Declaration of London, is substantially identical with section 20, Austro-Hungarian Manual, 1913.



**Contra.**

"We desire to add that the confiscation of a neutral ship merely upon the ground that 50 per cent. of her cargo is contraband of war cannot be justified and we shall support claims put forward in consequence of any confiscations which may take place upon this special ground."

The Marquess of Lansdowne to Sir C. Hardinge, British ambassador to Russia, August 10, 1904.

**A vessel cannot excuse herself for an illegal voyage by carrying despatches for her own Government.**

*The "Drummond," 1 Dod., 104.*—This was the case of an American vessel held to be prosecuting an illegal voyage to France. The master asserted she was carrying despatches from the President of the United States to the American chargé d'affaires in France.

Held that such employment can not be set up as protection for a voyage otherwise illegal.

*The "Jonge Tobias," 1 C. Rob., 329.*—In this case the court condemned the interest in the ship of the owner of the cargo and compelled the other owners of the ship to make affidavit that they had no knowledge that contraband goods were being carried.

**Contra.**

*The "Jonge Margaretha," 1 C. Rob., 189.*—In this case the cargo of cheese was condemned as contraband of war but the vessel was not condemned because "the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances, to which in strictness he ought to have averted, as well as by something like an irregular indulgence on which he has relied."

See also, *The Frau Margaretha*, 6 C. Rob., 92; *The Zeldon Rust*, 6 C. Rob., 125 (ships biscuit condemned); *The Edward*, 4 C. Rob., 68.

**Contra.**

*The "Mercurius," 1 C. Rob., 288.*—In a note to this case, it is said: "Formerly by the law of nations, the carrying of contraband articles of war worked a forfeiture of the ship. \* \* \* In modern practice, except where the contraband articles belong to the owner of the vessel, or where the case is attended with particular circumstances of aggravation, the penalty has been mitigated to a forfeiture of freight and expenses."

See to the same effect, *The Jonge Tobias*, 1 C. Rob., 329, and *The Rigende Jacob*, 1 C. Rob., 89.

*The "Franklin," 3 C. Rob., 217.*—In this case the court condemned the vessel, as having carried contraband *with a false destination*.

**Contra.**

*The "Neutralitet," 3 C. Rob., 395.*—In this case, the court recognized that "by the modern rule of international law" the ship is not subject to condemnation for carrying contraband, but condemned the vessel because, with the privity of the owner, she was engaged in a commerce forbidden by treaty.

**Ignorance of master not an excuse for carrying contraband.**

*The "Oster Risoer," 4 C. Rob., 199.*—In this case the master asked that he be paid freight on the contraband goods, on the ground that he was totally ignorant of the contents of the packages containing such goods.

The claim was disallowed and the court held that the "master could not be permitted to aver his ignorance; that he was bound, in time of war, to know the contents of his cargo."

*The "Richmond," 5 C. Rob., 325.*—This was the case of an American vessel, seized in the British port of St. Helena, with contraband articles on board, the quantity of which had been dissembled by the master. It further appeared that the original destination of these articles, either positive or eventual, was a French port, to which the master announced his purpose of going. There was also evidence to the effect that the master had professed an intention of selling his vessel in that port, for use as a French privateer, and it appeared that the vessel was well adapted for such use.

The vessel was condemned.

*The "Ranger," 6 C. Rob., 125.*—In this case the court condemned a neutral vessel for having carried contraband to a "place of naval equipment, under false papers."

*The "Eleonora Wilhelmina," 6 C. Rob., 331.*—In this case the court stated as a general rule that the existence on board a vessel of contraband articles extends the taint to the vessel, *being the property of the same owner.*

**Contra.**

*Carrington et al. v. The Merchant's Insurance Co., 8 Peters, 495.*—The court said: "According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy subjects them, if captured, *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter only when there has been some actual co-operation on their part in a meditated fraud upon the belligerents; by covering up the voyage under false papers and with a false destination. This is the general doctrine when the capture is made *in transitu*, while the contraband goods are yet on board."

See also, *The Peterhoff*, 5 Wall., 28.

**Contra.**

*The "Bermuda," 3 Wall., 314.*—In this case the court said that where goods destined ultimately for a belligerent port, are being conveyed between two neutral ports, by a neutral ship, under a charter made in good faith for the voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods, that the ship, although liable to seizure for the confiscation of the goods, is not liable to condemnation as prize.

**Condemnation of vessel, because of fraud and bad faith.**

*The "Bermuda," 3 Wall., 514; Darby v. The "Erstern," 2 Dall., 34; The "Fortuna," 3 Wheat., 236.*—In these cases it was held that a vessel is liable to condemnation for the conveyance of contraband goods

destined to a belligerent port, *under circumstances of fraud and bad faith*, which make the owner responsible for unneutral participation in the war.

**Contra.**

*The "Springbok," 5 Wall., 1.*—In this case it was held that where goods destined ultimately for a belligerent port are being conveyed between two neutral ports by a neutral ship, under a charter made *in good faith* for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods, the ship, though liable to seizure in order that the goods may be confiscated, is not liable to condemnation as prize.

**Contra.**

*Hendricks v. Gonzalez, 67 Fed. Rep., 351.*—The court said: "The penalty which affects contraband merchandise is not extended to the vessel which carries it, unless ship and cargo belong to the same owner, or the owner of the ship is privy to the contraband carriage; and ordinarily the punishment of the ship is satisfied by visiting upon her the loss of time, freight, and expenses which she incurs in consequence of her complicity."

*The "Cheltenham," Russian and Japanese Prize Cases, vol. 1, p. 17.*—This was a case of a British vessel captured on a voyage from a Japanese port to a port in Korea, then occupied by the Japanese troops. More than half of the cargo, in value, was found to be contraband.

Held by the Vladivostock Prize Court that the ship was liable to condemnation for the carriage of the contraband.

*The "Arabia," Russian and Japanese Prize Cases, vol. 1, p. 42.*—In this case the Prize Court held that as the contraband articles amounted to less than half the cargo, the ship should be released.

See also *The Calchas*, Russian and Japanese Prize Cases, vol. 1, p. 118; *The St. Kilda*, id., p. 188, and *The Prinzesse Marie*, id., p. 276.

**Contra.**

*The "Hsiping," Russian and Japanese Prize Cases, vol. 2, p. 133.*—This was a case of the capture of a neutral vessel, bound for a port occupied by the Russians, and carrying a cargo, the greater portion of which was contraband.

Held that inasmuch as none of the contraband goods belonged to the owners of the vessel and as there was no evidence to show that any fraudulent devices were employed in carrying the contraband, the vessel should be released.

See also *The Pehping*, Russian and Japanese Prize Cases, vol. 2, p. 162.

*The "Rosely," Russian and Japanese Prize Cases, vol. 2, p. 228.*—This was the case of an English vessel, which during the Russo-Japanese war, sailed for England, with a cargo of coal. The charter was for a voyage to Hongkong, Shanghai, or Kiaochow and at Hongkong clearance was obtained for Shanghai. She did not call at Shanghai, and was captured while pursuing a circuitous course for Vladivostock. The owner claimed the release of the ship.

The ship was condemned because:—

“Firstly, not only is Vladivostock an important Russian naval port used by Russia since the outbreak of the Russo-Japanese war as a base for her fleet, but it is also an established fact that Vladivostock has been made a military base depot, arms, provisions, coal, and other military supplies being collected there, while ordinary trade at the port has practically ceased. Therefore, the Prize Court was perfectly correct in holding that coal despatched to that port was destined for Russian military use, and in deciding accordingly that it was contraband of war, especially as the coal carried by this vessel was best Cardiff coal, for which the price in the Far East is extremely high, so that there is no demand for it except for naval use in time of war. The destination for the military purposes of Russia is thus all the clearer. Although the appellant contends that the cargo of this vessel should be held to be intended for peaceful purposes, in accordance with the precedent of the judgment in the case of the *Neptunus* (3 C. Rob. p. 108), the nature of the goods in this case and the circumstances of their place of destination are entirely different from those in the case of the *Neptunus*, and it is therefore quite obvious that it can not be followed in this case.

“Secondly, International Law recognizes the liability to condemnation of a vessel the object of whose voyage is, as in this case, the carriage of contraband of war, and the Higher Prize Court considers this rule to be in accordance with the needs of the case. Moreover, the whole of the cargo was contraband of war, and in spite of the fact that at the time of her departure from England, it was already clear that she was to proceed to Vladivostock, deceit was used in the charter-party and other ship’s papers as to her destination, that is to say, she carried contraband of war by fraudulent devices.”

See also *The Aphrodite*, Russian and Japanese Prize Cases, vol. 2, p. 240.

*The “Scotsman,” Russian and Japanese Prize Cases, vol. 2, p. 256.*—In this case the whole of the cargo was held to be contraband and the master of the vessel was found to have stated that the owner of the vessel would not incur any loss if the ship were condemned, as he had insured her for a sufficient sum, expecting a capture.

Held that the object of the ship was the carriage of contraband and she was condemned.

*The “Bawtry,” Russian and Japanese Prize Cases, vol. 2, p. 265.*—In this case, of a neutral vessel going to an enemy’s naval base and depot for supplies, the greater portion of the cargo was found to be contraband, and in the bills of lading and manifest the destination of the ship was falsely stated, although it was correctly given in the charter party. These false entries were made by the master, and the owner of the ship was not the owner of the cargo.

Held that the ship was liable to condemnation for carrying contraband with false papers and also because the object of her voyage was the carriage of contraband, and that the ship-owner was responsible for the fraudulent acts of the master.

*The “M. S. Dollar,” Russian and Japanese Prize Cases, vol. 2, p. 284.*—This was a case of a British ship captured while carrying a cargo of fodder to Vladivostock with papers showing a destination to Moji; her course was also incorrectly shown in the logs. At the

time of capture she was chartered by the owner of the cargo, Moji being the destination mentioned in the charter.

Held that the ship was liable to condemnation as the object of the voyage was the carriage of contraband and deception had been used.

See also *The Wyefield*, Russian and Japanese Prize Cases, vol. 2, p. 291.

*The "Paros," Russian and Japanese Prize Cases, vol. 2, p. 301.*—This was a case of a neutral ship carrying a cargo, the greater portion of which was contraband and bound to Vladivostock. All the ship's papers showed Hong Kong as the destination, but she was captured beyond that port and while pursuing a devious course to Vladivostock, which, it was admitted by the claimants, was the destination, with Hongkong only an alternative in case Vladivostock were blockaded.

Held that the ship was liable to condemnation, as the sole object of her voyage was the carriage of contraband, and she had employed fraudulent devices.

*The "Tacoma," Russian and Japanese Prize Cases, vol. 2, p. 314.*—This was a case of the capture of a neutral vessel carrying a cargo of contraband to Vladivostock. The owners of the ship were not the owners of the cargo, but it appeared that the ship-owners had appointed as supercargo an agent of contractors for the Russian army; that a false destination was given in some of the ship's papers and that she was attempting to enter Vladivostock by way of a most dangerous route, considering the time of the year.

The ship was condemned on the grounds that its owners were privy to the carriage of the contraband and had employed fraudulent means to effect it.

*The "Henry Bolckow," Russian and Japanese Prize Cases, vol. 2, p. 331.*—This was the case of a neutral vessel which took on a cargo of flour at Shanghai and obtained a clearance for Hong Kong. The bills of lading and others papers gave the destination as Korsakoff, and it was alleged that the flour was intended for the "starving people" of that place. The ship did not take the direct route for Korsakoff, nor display the proper lights.

Held by the Higher Prize Court that the real destination was Vladivostock; that the flour was contraband, and that the carriage of contraband was the object of the voyage. The ship and cargo were condemned.

*The "Antiope," Russian and Japanese Prize Cases, vol. 2, p. 387.*—This was the case of a neutral ship captured while carrying to a Russian port what was found by the Prize Courts to be contraband foodstuffs.

Held by the Yokosuka Prize Court that the vessel should be released on the ground that its owners (who were not the owners of the cargo) were not fully aware of the fact of the carriage of contraband.

Held by the Higher Prize Court that the vessel should be condemned on the ground that the object of her voyage was the carriage of contraband, concerning which carriage, the Court considered, from certain circumstances, the ship owners must have been fully aware.

PAYMENT OF COSTS AND EXPENSES IN EVENT OF RELEASE OF VESSEL CARRYING CONTRABAND.

If a vessel carrying contraband is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and the custody of the ship and cargo during the proceedings.—*Declaration of London, Article 41.*

It is not just that, on the one hand, the carriage of more than a certain proportion of contraband should involve the condemnation of the vessel, while if the contraband forms less than this proportion, it alone is confiscated. This often involves no loss for the master, the freight of this contraband having been paid in advance. Does this not encourage trade in contraband, and ought not a certain penalty to be imposed for the carriage of a proportion of contraband less than that required to entail condemnation? A kind of fine was proposed which should bear a relation to the value of the contraband articles. Objections of various sorts were brought forward against this proposal, although the principle of the infliction of some kind of pecuniary loss for the carriage of contraband seemed justified. The same object was attained in another way by providing that the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and of the custody of the vessel and of her cargo during the proceedings are to be paid by the vessel. The expenses of the custody of the vessel include in this case the keep of the captured vessel's crew. It should be added that the loss to a vessel by being taken to a prize port and kept there is the most serious deterrent as regards the carriage of contraband.

Report of committee which drafted Declaration of London.

\* \* \* the act of carrying contraband articles is attended with the loss of freight and expenses, \* \* \*.

Kent, vol. 1, p. 149.

\* \* \* the \* \* \* penalty upon him [the carrier of contraband] is the loss of his freight, time and expenses.

Dana's Wheaton, Note 230.

\* \* \* the carrying of articles contraband of war is now attended \* \* \* with the loss of freight and expenses.

Halleck, p. 572.

The more common practice is to take the vessel with its cargo into a port of the captor, where the articles of contraband are duly condemned; but the vessel itself is ordinarily visited with no further penalty than loss of time, freight and expense.

Hall, p. 693.

The vessel which carries [contraband goods] \* \* forfeits her freight for such goods and all rights to expenses the result of her Detention.

Holland, p. 24.

Article 41, Declaration of London, is substantially identical with section 21, Austro-Hungarian Manual, 1913.

*The "Mercurius," 1 C. Rob., 288.*—In a note to this case, it is said: "The penalty for carrying contraband has been mitigated to a forfeiture of freight and expenses."

*The "Neptunus," 3 C. Rob., 108.*—In this case the court allowed freight and expenses to the vessel since the contraband articles formed but a small proportion of the total cargo.

*Hendricks v. Gonzalez, 67 Fed. Rep., 351.*—The court said:—"Ordinarily the punishment of the ship [for carrying contraband] is satisfied by visiting upon her the loss of time, freight, and expenses which she incurs in consequence of her complicity."

**LIABILITY TO CONDEMNATION OF GOODS BELONGING TO OWNER OF CONTRABAND AND ON BOARD SAME VESSEL.**

**Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation.—**  
*Declaration of London, Article 42.*

The owner of the contraband is punished in the first place by the condemnation of his contraband property; and in the second by that of the goods, even if innocent, which he may possess on board the same vessel.

Report of committee which drafted Declaration of London.

**Contra.**

\* \* \* saying [saving?] nevertheless as well the ships themselves, as the other merchandizes which shall have been found therein, which by virtue of this present treaty are to be esteemed free, and which are not to be detained on pretence of their having been loaded with prohibited merchandize, and much less confiscated as lawful prize.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3. 1783, Article XIII.

**Contra.**

The articles of contraband, before enumerated and classified, which may be found in a vessel bound for an enemy's port, shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship, that the owners may dispose of them as they see proper.

Treaty of Peace, Amity, Navigation and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XIX.

**Contra.**

The articles of contraband before enumerated and classified which may be found in a vessel bound to an enemy's port shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship, that the owners may dispose of them as they see proper.

Treaty of Peace, Friendship, Commerce and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XIX.

**Extension of rule.**

But where the ship and the innocent articles of the cargo belong to the owner of the contraband, they are all involved in the same penalty. And even where the ship and the cargo do not belong to the same person, the carriage of contraband, under the fraudulent circumstances of false papers and false destination, will work a confiscation of the ship as well as the cargo. The same effect has likewise been held to be produced by the carriage of contraband articles in a ship, the owner of which is bound by the express obliga-



tion of the treaties subsisting between his own country and the capturing country, to refrain from carrying such articles to the enemy. In such a case, it is said that the ship throws off her neutral character, and is liable to be treated at once as an enemy's vessel, and as a violator of the solemn compacts of the country to which she belongs.

Danas Wheaton, pp. 639-644.

When the cargo does not wholly consist of contraband goods, the innocent articles of innocent shippers are restored; but all the goods of the owner of the contraband articles, even those which are innocent share the same fate.

Halleck, p. 573.

The principle which, according to the English practice, governs the treatment of innocent merchandise found on board a ship engaged in the transport of contraband, is identical with that which affects the vessel itself. "The law of nations," said Lord Stowell, "in my opinion is, that to escape the contagion of contraband, the innocent articles must be the property of a different owner."

Hall, p. 694.

A Vessel which herself is Contraband is liable to be confiscated, together with such part of her Cargo as belongs to her Owner.

Holland, p. 25.

The Penalty for carrying Contraband Goods with Simulated Papers, or in disregard of express stipulations by Treaty, is confiscation not only of the Contraband Goods, but also of the Vessel, and any interest which her Owner has in the rest of the Cargo.

Holland, p. 25.

\* \* \* that portion of the cargo which belongs to the owners of the contraband, shall be condemned.

Japanese Regulations 1904, Article 43.

In the cargo, subject to confiscation are:—

(a) Articles which may be seized as absolute or relative contraband.

(b) merchandise belonging to their owner.

German Prize Rules, 1909, Article 42.

Article 42, Declaration of London, is substantially identical with section 22, Austro-Hungarian Manual, 1913.

*The "Staadts Embden," 1 C. Rob., 26.*—In this case the court condemned all the cargo, since the innocent portion belonged to the owners of the contraband.

The court said: "The statement of the Kings Advocate is in my opinion the law of nations, upon this point.—To escape from the contagion of contraband, the innocent articles must be the property of a different owner."

*The "Floreat Commmercium," 3 C. Rob., 178.*—In this case, of the condemnation of a ship, the cargo was condemned as belonging to the same owner.

*The "Eleonora Wilhelmina,"* 6 C. Rob., 331.—In this case the court stated as a general rule that the existence on board a vessel of contraband articles extends the taint to other parts of the cargo, being the property of the same owner.

*Carrington et. al. v. The Merchants Insurance Co.,* 8 Peters, 495.—The court said: "\* \* \* the carriage of contraband goods to the enemy subjects them, if captured, *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, *if they do not belong to the owner of the contraband goods*, are not subject to the same penalty."

See also *The Peterhoff*, 5 Wall., 28.

*The "Bermuda,"* 3 Wall., 514.—In this case it was held that as the cargo had all been consigned to enemies and most of it was contraband, it must share the fate of the ship when that is condemned.

*The "Peterhoff,"* 5 Wall., 28.—In this case it was held that contraband articles contaminate the whole cargo belonging to the same owners.

*The "Hsiping,"* *Russian and Japanese Prize Cases*, vol. 2, p. 133.—Innocent goods belonging to the owner of the contraband and on board the same vessel were condemned, and innocent goods not belonging to the owner of contraband were released.

See also *The Pehping*, id., p. 162; and *Cargo ex Bawtry*, id., p. 270, and *The Paros*, id., p. 301.

*Cargo Ex "Hsiping,"* *Russian and Japanese Prize Cases*, vol. 2, p. 140.—The court held it immaterial that innocent goods belonging to owner of contraband had different destination from contraband and were bound to neutral port.

**TREATMENT OF VESSEL CARRYING CONTRABAND AND OF HER CARGO, IF WITHOUT KNOWLEDGE OF HOSTILITIES OR WITHOUT OPPORTUNITY TO DISCHARGE CONTRABAND, AFTER KNOWLEDGE—WHEN KNOWLEDGE PRESUMED.**

If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband.

A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.—*Declaration of London, Article 43.*

This provision is intended to spare neutrals who might in fact be carrying contraband, but against whom no charge could be made. This may arise in two cases: The first is that in which they are unaware of the outbreak of hostilities; the second is that in which, though aware of this, they do not know of the declaration of contraband made by a belligerent, in accordance with articles 23 and 25, which is, as it happens, the one applicable to the whole or a part of the cargo. It would be unjust to capture the ship and condemn the contraband; on the other hand, the cruiser can not be obliged to let go on to the enemy goods suitable for use in the war of which he may stand in urgent need. These opposing interests are reconciled by making condemnation conditional on the payment of compensation. (See the convention of the 18th October, 1907, on the rules for enemy merchant vessels on the outbreak of hostilities, which expresses a similar idea.)

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It is likewise agreed that whatever shall be found to be laden by the subjects of either of the two contracting parties, on a ship belonging to the enemies of the other party, the whole effects, although not of the number of those declared contraband, shall be confiscated as if they belonged to the enemy, excepting nevertheless such goods and merchandizes as were put on board before the declaration of war,

and even six months after the declaration, after which term none shall be presumed to be ignorant of it, which merchandizes shall not in any manner be subject to confiscation, but shall be faithfully and specifically delivered to the owners, who shall claim or cause them to be claimed before confiscation and sale, as also their proceeds, if the claim be made within eight months, and could not be made sooner after the sale, which is to be public: provided, nevertheless, that if the said merchandizes be contraband, it shall not be in any wise lawful to carry them afterwards to a port belonging to the enemy.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, Article XIV.

So far as neutrals are concerned, the right to take prize cannot be exercised until the belligerents have notified the neutrals that war exists.

Institute, 1882, p. 46.

The right to take prize cannot be exercised as to vessels and cargoes until they have had knowledge of the existence of the war. There is no basis for the taking of prize if the master of the vessel or owner of the cargo proves that he did not have such knowledge.

Institute, 1882, p. 46.

Transportation under way before the declaration of war and without necessary knowledge of its imminence shall not be punishable.

Institute, 1896, p. 131.

The Commander should detain any Neutral Vessel which is engaged in the Carriage of Contraband, is acting in the service of the Enemy by carrying Military Persons or Despatches, or is engaged in Breach of Blockade; unless either:

(1) He is satisfied that her Master was acting in ignorance that war had broken out; or

(2) The Vessel is acting under a Licence from the British Government.

Holland, p. 16.

44. When a ship upon being visited has no knowledge of the outbreak of hostilities or of the contraband declaration applicable to her cargo, the contraband may be seized by bringing in the ship, but it is subject to confiscation only with reimbursement for damages, while the ship and the other cargo are exempt from confiscation. \* \* \*

The same holds when the master had acquired the information in question, but had not been able to discharge the contraband in a port; it is not to be accepted as an objection that he would have had to deviate from his course to do so.

45. In judging whether the knowledge in question existed, it is to be taken into consideration.

(a) that the state of war is made known immediately in German, allied, and enemy ports, as far as they have telegraphic connection;

(b) that the beginning of hostilities is made known immediately to neutral governments by telegraph and is by them immediately in the same way communicated to their port authorities;

(c) that the declaration as to contraband is published in the German Empire upon the outbreak of hostilities and is communicated to allied and neutral governments by telegraph, who will communicate it to their port authorities etc. without delay;

(d) that the contraband declaration will not become known in enemy ports at least for the present.

46. The captain can abstain from the seizure of a ship carrying contraband which is not herself liable to confiscation under 41, when the master is ready to deliver over the contraband to him.

The delivery of the contraband is to be entered in the log-book of the ship visited, the master of the ship must deliver to the captain for the prize court proceedings an attested copy of all relevant papers.

The captain is authorized to destroy the contraband so delivered to him.

47. Concerning the law for the seizure of the parts of the cargo mentioned under 42 without bringing in the ship, see 121. In case of No. 44 this law does not apply to the merchandise belonging to the owner of the contraband.

German Prize Rules, 1909, Articles 44-47.

If you encounter a vessel at sea which is without knowledge of the hostilities or of the declaration of contraband applicable to its cargo, you may nevertheless seize these contraband articles: but as the confiscation of said articles may later give rise to an indemnity, you will take care to draw up a very exact minute of the nature, weight, and value of the goods thus seized. In this case, the ship and the rest of its cargo, while being subject to seizure will be exempt from confiscation. The same rule applies if the master, after becoming aware of the outbreak of hostilities or of the declaration of contraband, has had no opportunity of discharging the contraband.

French Naval Instructions, 1912, sec. 53.

Section 54, French Naval Instructions, 1912, is substantially identical with paragraph 2. Article 43, Declaration of London.

Article 43, Declaration of London, is substantially identical with section 23. Austro-Hungarian Manual, 1913.

#### **Contra as to enemy vessels.**

*The "Ekaterinoslav," Russian and Japanese Prize Cases, vol. 2, p. 1.*—Held that the fact that the vessel (Russian) was captured while still in ignorance of the outbreak of hostilities afforded no ground for claiming exemption either under the general principles of international law, or under the special provisions of the Japanese Ordinance.

See also *The Mukden*, Russian and Japanese Prize cases, vol. 2, p. 12.

*The "Hermes," Russian and Japanese Prize Cases, vol. 2, p. 50.*—This was a case of a neutral vessel which left a Japanese port with a cargo of coal for Port Arthur on the day that hostilities began but without knowledge thereof.

Held that in view of such lack of knowledge neither the ship nor her cargo was liable to condemnation.

TREATMENT OF VESSEL CARRYING CONTRABAND IF SHE SURRENDERS CONTRABAND TO  
BELLIGERENT WAR-SHIP—RIGHTS AND DUTIES OF MASTER AND CAPTOR.

A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent warship.

The delivery of the contraband must be entered by the captor on the logbook of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers.

The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.—*Declaration of London, Article 44.*

A neutral vessel is stopped for carrying contraband. She is not liable to condemnation, because the contraband does not reach the proportion specified in article 40. She can, nevertheless, be taken to a prize port for judgment to be passed on the contraband. This right of the captor appears too wide in certain cases, if the importance of the contraband, possibly slight (for instance, a case of guns or revolvers), is compared with the heavy loss incurred by the vessel by being thus turned out of her course and detained during the time taken up by the proceedings. The question has, therefore, been asked whether the right of the neutral vessel to continue her voyage might not be admitted if the contraband articles were handed over to the captor, who, on his part, might only refuse to receive them for sufficient reasons, for instance, the rough state of the sea, which would make transshipment difficult or impossible, well-founded suspicions as to the amount of contraband which the merchant vessel is really carrying, the difficulty of stowing the articles on board the warship, etc. This proposal did not gain sufficient support. It was alleged to be impossible to impose such an obligation on the cruiser, for which this handing over of goods would almost always have drawbacks. If, by chance, it has none, the cruiser will not refuse it, because she herself will gain by not being turned out of her course by having to take the vessel to a port. The idea of an obligation having thus been excluded, it was decided to provide for the voluntary handing over of the contraband, which, it is hoped, will be carried out whenever possible, to the great advantage of both parties. The formalities provided for are very simple and need no explanation.

There must be a judgment of a prize court as regards the goods thus handed over. For this purpose the captor must be furnished with the necessary papers. It may be supposed that there might be doubt as to the character of certain articles which cruiser claims as contraband; the master of the merchant vessel contests this claim, but

prefers to deliver them up so as to be at liberty to continue his voyage. This is merely a capture which has to be confirmed by the prize court.

The contraband delivered up by the merchant vessel may hamper the cruiser, which must be left free to destroy it at the moment of handing over, or later.

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And in case the contraband merchandize be only a part of the cargo, and the master of the vessel agrees, consents, and offers to deliver them to the vessel that has discovered them, in that case the latter, after receiving the merchandizes which are good prize, shall immediately let the vessel go, and shall not by any means hinder her from pursuing her voyage to the place of her destination.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3. 1783, Article XIII.

But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it; and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

Treaty of Amity and Commerce concluded between the United States and Prussia, July 11. 1799, Article XIII.

No vessel of either of the two nations shall be detained on the high seas on account of having on board articles of contraband, whenever the master, captain or supercargo of said vessels will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great and of so large a bulk that they cannot be received on board the capturing ship without great inconvenience.

Treaty of Peace, Amity, Navigation, and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XIX.

No vessel of either of the two nations shall be detained on the high seas on account of having on board articles of contraband, whenever the master, captain or supercargo of said vessel will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great or of so large a bulk that they cannot be received on board the capturing ship without great inconvenience \* \* \*

Treaty of Peace, Friendship, Commerce, and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XIX.

The vessel which has been stopped because it carries contraband of war may continue its voyage if its cargo is not composed exclusively or principally of contraband of war, if the master is ready to deliver to the belligerent vessel the contraband of war, and if the commander of the cruiser believes that the unloading may take place without difficulty.

Institute, 1882, p. 52.

**Contra, to some extent.**

It is for the interest of the neutral carrier, if he knows that the goods claimed by the visiting cruiser are contraband, to give them up, and be permitted to go on his way, rather than to be carried into the

belligerent's port to await adjudication upon them. In the seventeenth article of the treaty of 1800 between the United States and France, which expired in 1808, there is a provision, that, if the vessel boarded shall have contraband goods, and shall be willing to surrender them to the cruiser, she shall be permitted to pursue her voyage, unless the cruiser is unable to take them on board, in which case the vessel shall accompany her to port. This stipulation is common in the treaties between the United States and the other American republics. Hautefeuille contends for this as a right of a neutral by international law; by which, however, he means that it should be the neutral's right, by justice and reason, in the author's opinion. No national act in diplomacy, or based on adjudication, and independent of treaty, has been produced or suggested by the distinguished author, in affirmance of such a right. It is to be observed, that, as the captor must still take the cargo into port, and submit it to adjudication, and as the neutral carrier cannot bind the owner of the supposed contraband cargo not to claim it in court, the captor is entitled, for his protection, to the usual evidence of the ship's papers, and whatever other evidence induced him to make the capture, as well as to the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all these papers, and deliver them to the captor; and certainly the testimony of the persons on board cannot be taken at sea in the manner required by law. Such a provision may be applicable to a case where the owner of the goods, or a person capable of binding him, is on board, and assents to the arrangement, agreeing not to claim the goods in court; but not to a case where the owner is not bound. There may also be a doubt whether the ostensible owner or agent is really such; and so the captor may be misled. Indeed, a strong argument might be made from these considerations, that the article in the treaty can only be applied to a case where there is the capacity in the neutral vessel to insure the captor against a claim on the goods.

Dana's Wheaton, Note 230.

#### **Contra, to some extent.**

Some writers consider that the neutral vessel has even a right to purchase the free continuance of her voyage at the price of abandoning to the belligerent whatever contraband goods she has on board, unless their quantity is so great that the captor cannot receive them. The existence of any such general right would be difficult to prove; but a large number of treaties have established the practice between certain nations; and it was followed by the Confederate States during the American Civil War. It can scarcely be believed however that its vitality could stand the rude test of a serious maritime war.

Hall, pp. 692.

#### **Differing practice of States.**

Hitherto the practice of the several States has differed \* \* \* with regard to the question as to whether a vessel which was not herself liable to condemnation might be allowed to proceed on her voyage on condition that she handed over the contraband carried by her to the captor. Great Britain and some other States answered it in the negative, but several States in the affirmative.

Oppenheim, vol. 2, p. 513.



**Contra.**

The Commander will not be justified in taking out of a vessel any Contraband Goods he may have found on board, and then allowing the Vessel to proceed; his duty is to detain the Vessel, and send her in for Adjudication, together with the Contraband Goods on board.

Holland, p. 24.

In cases where the contraband of war is alone liable to confiscation, and not the vessels carrying it \* \* \*, the vessel herself is to be detained only until the contraband has been handed over. The delivery may take place, at the discretion of the Commander making the seizure, either on the spot where the seizure takes place, or after the captured ship has been brought into port.

Russian Regulations, 1895, Article 14.

The captain can abstain from the seizure of a ship carrying contraband which is not herself liable to confiscation under 41, when the master is ready to deliver over the contraband to him.

The delivery of the contraband is to be entered in the log book of the ship visited, the master of the ship must deliver to the captain for the prize court proceedings an attested copy of all relevant papers.

The captain is authorized to destroy the contraband so delivered to him.

German Prize Rules, 1909. Article 46.

Sections 51 and 52, French Naval Instructions, 1912, are substantially identical with Article 44, Declaration of London.

Article 44, Declaration of London, is substantially identical with section 24, Austro-Hungarian Manual, 1913.

**CONDEMNATION OF NEUTRAL VESSEL AND GOODS OF OWNER FOR SPECIFIED UNNEUTRAL SERVICE—EXCEPTION IN CASE OF LACK OF KNOWLEDGE OF HOSTILITIES OR LACK OF OPPORTUNITY, AFTER KNOWLEDGE, TO DISCHARGE BELLIGERENT PASSENGERS—WHEN KNOWLEDGE PRESUMED.**

A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:—

- (1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.
- (2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present Article do not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities, or a neutral port subsequently to the notification of the outbreak of hostilities to the Power to which such port belongs, provided that such notification was made in sufficient time.—

*Declaration of London, Article 45.*

In a general way, it may be said that the merchant vessel which violates neutrality, whether by carrying contraband of war or by breaking blockade, affords aid to the enemy, and it is on this ground that the belligerent whom she injures by her acts is justified in inflicting on her certain losses. But there are cases where such unneutral service bears a particularly distinctive character, and for such cases it has been thought necessary to make special provision. They have been divided into two classes according to the gravity of the act of which the neutral vessel is accused.

In the cases included in the first class (art. 45), the vessel is condemned, and receives the treatment of a vessel subject to condemnation for carrying contraband. This means that the vessel does not

lose her neutral character and has a full claim to the rights enjoyed by neutral vessels; for instance, she may not be destroyed by the captor except under the conditions laid down for neutral vessels (arts. 48 et seq.); the rule that the flag covers the goods applies to goods she carries on board.

The first case supposes passengers traveling as individuals; the case of a military detachment is dealt with hereafter. The case is that of individuals embodied in the armed military or naval forces of the enemy. There was some doubt as to the meaning of this word. Does it include those individuals only who are summoned to serve in virtue of the law of their country and who have really joined the corps to which they are to belong? Or does it also include such individuals from the moment when they are summoned and before they join that corps? The question is of great practical importance. Supposing the case is one of individuals who are natives of a continental European country and are settled in America; these individuals have military obligations toward their country of origin; they have, for instance, to belong to the reserve of the active army of that country. Their country is at war and they sail to perform their service. Shall they be considered as embodied in the sense of the provision which we are discussing? If we judged by the municipal law of certain countries we might argue that they should be so considered. But, apart from reasons of pure law, the contrary opinion has seemed more in accordance with practical necessity and has been accepted by all in a spirit of conciliation. It would be difficult, perhaps even impossible, without having recourse to vexatious measures to which neutral governments would not willingly submit, to pick out among the passengers in a vessel those who are bound to perform military service and are on their way to do so.

The transmission of intelligence in the interest of the enemy is to be treated in the same way as the carriage of passengers embodied in his armed force. The reference to a vessel especially undertaking a voyage is intended to show that her usual service is not meant. She has been turned from her course; she has touched at a port which she does not ordinarily visit in order to embark the passengers in question. She need not be exclusively devoted to the service of the enemy; that case would come into the second class (art. 56 (4)).

In the two cases just mentioned the vessel has performed but a single service; she has been employed to carry certain people, or to transmit certain intelligence; she is not continuously in the service of the enemy. In consequence she may be captured during the voyage on which she is performing the service which she has to render. Once that voyage is finished, all is over, in the sense that she may not be captured for having rendered the service in question. The principle is the same as that recognized in the case of contraband (art. 38).

The second case also falls under two heads.

There is, first, the carriage of a military detachment of the enemy, or that of one or more persons who during the voyage directly assist his operations, for instance, by signaling. If these people are soldiers or sailors in uniform there is no difficulty, the vessel is clearly liable for condemnation. If they are soldiers or sailors in mufti, who might be mistaken for ordinary passengers, knowledge on the part of

the master or owner is required, the charterer being assimilated to the latter. The rule is the same in the case of persons directly assisting the enemy during the voyage.

In these cases, if the vessel is condemned for unneutral service, the goods belonging to her owner are also liable to condemnation.

These provisions assume that the state of war was known to the vessel engaged in the operations specified; such knowledge is the reason and justification of her condemnation. The position is altogether different when the vessel is unaware of the outbreak of hostilities, so that she undertakes the service in ordinary circumstances. She may have learned of the outbreak of hostilities while at sea, but have had no chance of landing the persons whom she was carrying. Condemnation would then be unjust, and the equitable rule adopted is in accordance with the provisions already accepted in other matters. If a vessel has left an enemy port subsequently to the outbreak of hostilities, or a neutral port after that outbreak has been notified to the power to whom such port belongs, her knowledge of the existence of a state of war will be presumed.

The question here is merely one of preventing the condemnation of the vessel. The persons found on board her who belong to the armed forces of the enemy may be made prisoners of war by the cruiser.

Report of committee which drafted Declaration of London.

Relations of peace and amity between the United States and China being established by this treaty, and the vessels of the United States being admitted to trade freely to and from the ports of China open to foreign commerce, it is further agreed that, in case at any time hereafter China should be at war with any foreign nation whatever, and should for that cause exclude such nation from entering her ports, still the vessels of the United States shall not the less continue to pursue their commerce in freedom and security, and to transport goods to and from the ports of the belligerent powers, full respect being paid to the neutrality of the flag of the United States, provided that the said flag shall not protect vessels engaged in the transportation of officers or soldiers in the enemy's service, nor shall said flag be fraudulently used to enable the enemy's ships, with their cargoes, to enter the ports of China; but all such vessels so offending shall be subject to forfeiture and confiscation to the Chinese Government.

Treaty of Peace, Amity, and Commerce concluded between the United States and China, June 18, 1858, Article XXVI.

In the same category as transportation of contraband of war is transportation of troops for military operations by the enemy on land and sea, as well as transportation of official correspondence of the enemy by neutral or enemy national merchant vessels.

Institute, 1882, p. 52.

The prize courts can not condemn enemy or neutral prizes, except on the following grounds:

1. Prohibited transportation in time of war; \* \* \*

Institute, 1887, p. 76.

contra, to some extent.

The vessel transporting them [official correspondence, contraband, or troops, to an enemy destination] shall not be condemned unless:

1. It offers resistance;
2. It transports enemy troops;
3. If the cargo in course of transportation to an enemy destination is composed principally of provisions for the war vessels or troops of the enemy.

Institute, 1887, p. 77.

The transportation of an enemy's troops, soldiers, or agents of war is forbidden: 1. in belligerent waters; 2. between their authorities, ports, possessions, armies, or fleets; 3. when the transportation is on account of or by order or mandate of an enemy, or to bring him either agents with a commission for war operations, or soldiers already in his service or auxiliary troops or those recruited in violation of neutrality,—between neutral ports, between those of a neutral and those of a belligerent, from a neutral point to the army or the fleet of a belligerent.

The prohibition shall not extend to the transportation of individuals who are not yet in the military service of a belligerent, even though they have the intention of entering it, or those who make the journey as simple travelers without evident connection with military service.

Institute, 1896, pp. 130, 131.

The transportation of dispatches (official communications between official authorities) between two authorities of an enemy, who are on territory or a ship belonging to or occupied by him, except regular and ordinary traffic, is forbidden.

This prohibition shall not extend to transportation either between neutral ports, or emanating from or destined for some neutral territory or authority.

Institute, 1896, p. 131.

Transportation under way before the declaration of war and without necessary knowledge of its imminence shall not be punishable.

Institute, 1896, p. 131.

Illegal transportation of agents, soldiers and dispatches for a belligerent, hitherto in the same category as the carrying of contraband, shall be treated as prohibited transport service, according to the second part of the International Regulations on contraband of war.

Institute, 1896, p. 142.

In order that a vessel may be condemned because of being engaged in transportation prohibited in time of war, it is necessary:

\* \* \* \* \*

2. That the forbidden transportation service be for him [the enemy];

3. That the object transported be itself prohibited;

4. That the ship be caught in the act.

Institute, 1896, p. 142.

There are other acts of illegal assistance afforded to a belligerent besides supplying him with contraband goods, and relieving his distress, under a blockade. Among these acts, the conveyance of hostile despatches is the most injurious, and deemed to be of the most hostile and noxious character. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, and it may lead to a defeat of all the projects of the other belligerent in that theatre of the war. The appropriate remedy for this offence is the confiscation of the ship; and in doing so, the courts make no innovation on the ancient law, but they only apply established principles to new combinations of circumstances. There would be no penalty in the mere confiscation of the despatches. The proper and efficient remedy is the confiscation of the vehicle employed to carry them; and if any privity subsists between the owners of the cargo and the master, they are involved by implication in his delinquency. If the cargo be the property of the proprietor of the ship, then, by the general rule, *ob continentiam delicti*, the cargo shares the same fate, and especially if there was an active interposition in the service of the enemy, concerted and continued in fraud.

A distinction has been made between carrying despatches of the enemy between different parts of his dominions and carrying despatches of an ambassador from a neutral country to his own sovereign. The effect of the former despatches is presumed to be hostile; but the neutral country has a right to preserve its relations with the enemy, and it does not necessarily follow that the communications are of a hostile nature. Ambassadors resident in a neutral country are favorite objects of the protection of the law of nations, and their object is to preserve the relations of amity between the governments; and the presumption is, that the neutral state preserves its integrity, and is not concerned in any hostile design.

Kent, vol. 1, pp. 157-159.

And if, upon making the search, the vessel be found employed in contraband trade, or in carrying enemy's property, or troops, or despatches, she is liable to be taken and brought in for adjudication, before a prize court.

Kent, vol. 1, p. 160.

Suppose a neutral vessel to transmit signals between two portions of a fleet engaged in hostile combined operations, and not in sight of each other. She is, doubtless, liable to condemnation. It is immaterial whether these squadrons are at sea or in ports of their own country, or in neutral ports, or how far they are apart, or how important the signals actually transmitted may be to the general results of the war, or whether the neutral transmits them directly or through a repeating neutral vessel. The nature of the communication establishes its final destination; and it is immaterial how far the delinquent neutral carries it on its way. The reason of the condemnation is *the nature of the service in which the neutral is engaged*. Suppose the neutral, instead of transmitting intelligence or orders by signals, takes the communication from squadron to squadron in the form of a verbal or written message, or gives transportation, under protection of his neutral flag, to an officer whom he

knows to be intrusted with such a message,—the result must be the same. If we assume the character of the service to be settled as an unneutral intervention in direct aid of the enemy in conducting his enterprises, it must be immaterial whether the service be performed between Portsmouth and the Cove of Cork, or between Portsmouth and Hong Kong. The national character of places at which the illegal service begins and ends is also immaterial. If the message is to be carried from Portsmouth to Hong Kong by stages, the neutral that carries it on its way between neutral ports, by agreement with the belligerent government, is violating the duties of neutrality as much as any other parties to the transaction.

The same reasoning applies to the carrying of corporeal instrumentalities of war. If an organized regiment of artillery, with its batteries, is to be sent from one point of military operations to another, a neutral vessel, that voluntarily aids in the transportation, engages, so far, in the enemy's belligerent service. If the character of the service is admitted to be unneutral, it is, of course, immaterial how far the neutral takes the troops on their way, and whether both or either of the *termini* of his trip are in belligerent territory.

The cases supposed are extreme, for the purpose of making more plain and undeniable the reason of the rule. The reason is, that the neutral is engaged in the belligerent service of the enemy. This, the other belligerent may prevent; and, in order to prevent, may inflict adequate penalties, to deter all others, as well as to punish the offender. It is agreed by nations that the penalty may be the condemnation of the vessel, and of any property on board which the wrong-doer fairly represents.

Note 228, Dana's Wheaton.

At the beginning of the Crimean war, the Declaration of Great Britain, of 28th March, 1854 (and that of France was to the same effect), was in these words: "It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of *preventing neutrals from bearing the enemy's despatches.*"

At the beginning of the civil war in the United States, the royal proclamation of neutrality of 13th May, 1861, warns British subjects against "carrying officers, soldiers, *despatches*, arms, military stores, \* \* \* for the use of either of the contending parties," as "acts in derogation of their duty as subjects of a neutral sovereign." The decree of the Emperor of the French was more general: "Frenchmen residing in France or abroad must likewise abstain from any act which, committed in violation of the laws of the empire or of the law of nations, might be considered as an act hostile to one of the two parties, and contrary to the neutrality we have resolved to observe."

The Spanish decree of June 17, 1861, says, "The transportation of munitions of war is forbidden, *as well as the carrying of papers or communications for the belligerents.*"

The Declaration of Paris of 1856 is silent on this subject. The proposed international code of Spanish America, of 1862, in connection with its recognition of the Declaration of Paris, had this provision: "Besides the articles qualified as such, are to be deemed

contraband of war *commissioners of every description* sent by belligerents, and the *despatches* of which they are the bearers."

These national acts indicate that, in the opinion of nations, it is still, as heretofore, considered that, under certain circumstances, the carrying of communications or persons, for the belligerents, may be justly deemed **unneutral acts**.

Note 228, Dana's Wheaton.

**Impressment into enemy's service no excuse.**

A neutral vessel, which is used as a transport for the enemy's forces, is subject to confiscation, if captured by the opposite belligerent. Nor will the fact of her having been impressed by violence into the enemy's service, exempt her. The master cannot be permitted to aver that he was an involuntary agent. Were an act of force exercised by one belligerent power on a neutral ship or person to be considered a justification for an act, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demands must seek redress from the government which has imposed the restraint upon him. As to the number of military persons necessary to subject the vessel to confiscation, it is difficult to define; since fewer persons of high quality and character may be of much more importance than a much greater number of persons of lower condition. To carry a veteran general, under some circumstances, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater, and therefore the belligerent has a stronger right to prevent and punish it; nor is it material, in the judgment of the prize court, whether the master be ignorant of the character of the service on which he is engaged. It is deemed sufficient if there has been an injury arising to the belligerent from the employment in which the vessel is found. If imposition be practised, it operates as force; and if redress is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the privity of the immediate offender.

The fraudulently carrying the despatches of the enemy will also subject the neutral vessel, in which they are transported, to capture and confiscation. The consequences of such a service are indefinite, infinitely beyond the effect of any contraband that can be conveyed.

Dana's Wheaton, 630-635.

So, also, if the owner of a neutral ship has suffered his vessel to be employed in transporting military persons \* \* \* for the enemy, the vessel and cargo are condemned. Nor in such cases is it held necessary that the privity of the master, or his owners, be shown: it is sufficient that the employment be proven; no plea of ignorance or imposition is received. \* \* \* In the case of the transportation of ninety French mariners from Baltimore to Bordeaux, in a neutral vessel, it was contended that there was no proof that they were to be immediately employed in military service. This distinc-



tion was discarded by the prize court. It was enough, said Sir Wm. Scott, that they were military persons, and that their transportation, the act of their government. It was not the mere fact of carrying military persons, but the fact of the vessel letting herself out, in a distinct manner, under a contract, for that purpose. If a military officer were going merely as an ordinary passenger, as other passengers, and at his own expense, neither that, nor any other British tribunal, had ever laid down the principle to the extent of condemning a vessel for such transportation.

Halleck, p. 642.

A neutral vessel fraudulently carrying the dispatches of an enemy, is, as a general rule, liable to condemnation. Public dispatches are defined to embrace all official communications of public officers relating to public affairs. \* \* \* The mere fact that such dispatches were found on board a neutral vessel, is not sufficient to produce her condemnation; for the rule refers to a *fraudulent* carrying of the dispatches of the enemy, and it is presumed that it would not apply to regular postal packets, whose mails, by international conventions, are distributed throughout the civilized world; nor even to merchant vessels which, in some countries, are obliged to receive letters and mail matter sent to them from the post-offices. The master must necessarily be ignorant of the contents of the letters so received, and, in the absence of all suspicion of *fraud*, or of interposition in the service of the enemy, the mere carrying of an enemy's dispatches, under such circumstances, could hardly be regarded as a delinquency under the law of nations, and a violation of neutral duty. The case is very different where the neutral vessel is employed by the belligerent for that purpose, or carries them fraudulently, and in the service used for the benefit of a belligerent. Another important exception to this rule, is the conveyance of the dispatches of an ambassador, or other public minister of the enemy, resident in a neutral state.

Halleck, pp. 642, 643.

The conveyance of troops for a belligerent has long been regarded as highly criminal. In the commercial treaty of Utrecht of 1713 (Dumont, viii., i., 345), between France and Great Britain, it is provided that the liberty granted to goods on a free or neutral ship "shall be extended to persons sailing on the same, in such wise that, though they be enemies of one or both the parties, they shall not be taken from the free ship, unless they be military persons, actually in the service of the enemy". Many modern treaties contain the same exception from the protection of the neutral flag and in nearly the same words: as for instance those of 1785 and 1800 between France and the United States, and those of the latter with Guatemala, San Salvador, and Peru. Our formula of exception is "unless they are officers or soldiers, and in the actual service of the enemy". As for the number of persons of this sort, so transported, which will involve a vessel in guilt and lead to its condemnation, it may perhaps be said that a soldier or two, like a package or two of contraband articles, might be overlooked; but it is held that to forward officers, especially of high rank, or even a single officer, would subject the neutral vessel to confiscation. (The *Orozembo*, Robinson's

Rep., vi., 434. Phillim., iii., Sec. 272.) A modern case shows the rigor of the English courts in regard to such transportation. The Bremen ship *Greta* was condemned in 1855, during the Crimean war, by a prize court at Hong Kong, for carrying two hundred and seventy shipwrecked Russian officers and seamen from a Japanese to a Russian harbor,—although had this conduct been dictated by mere humanity condemnation could not have taken place.

Woolsey, pp. 335, 336, Marquardsen, n. s. p. 59.

If the obligations of neutrality forbid the conveyance of contraband goods to the enemy, they also forbid the neutral to convey to him ships, whether of war or of transport, with their crews, and still more to forward his troops and his despatches. These have sometimes been called contraband articles, which name a treaty of England with Sweden in 1691 expressly gives to soldiers together with horses and ships of war and of convoy. They have been called, again, "contraband par accident". But in truth, as Heffter remarks, they are something more than contraband, as connecting the neutral more closely with the enemy. A contraband trade may be only a continuation of one which was legitimate in peace, but it will rarely happen that a neutral undertakes in time of peace to send troops of war to another nation, and the carrying of hostile despatches implies a state of war.

Woolsey, p. 335.

No rule of international law, forbidding the conveyance of hostile despatches, can be produced, of an earlier date than the first years of the present century. Sir William Scott (Lord Stowell) seems to have struck out this rule, as a deduction, and we may say, as a fair deduction, from the general obligation of neutrality. \* \* \*

This rule, in its general form, if not in its harsher features, may be said to have passed into the law of nations. Not only the declarations of England and France, made in the spring of 1854, but the contemporaneous ones of Sweden and Prussia sanction it, and the government of the United States in one instance has accepted it as a part of the law of nations. It is received as such by text-writers of various nationalities, by Wildman and Phillimore, by Wheaton, by Heffter, Marquardsen, and other German writers, by Ortolan and Hautefeuille. The last named publicist gives a modification of the rule, which, though of private authority, deserves serious attention. Despatches can be transported, says he, from one neutral port to another, from a neutral to a belligerent, or from a belligerent to a neutral, or finally from one belligerent port to another. In the three first cases the conveyance is always innocent. In the last it is guilty only when the vessel is chartered for the purpose of carrying the despatches; but when the master of a packet boat or a chance vessel takes despatches together with other mail matter according to usage, he is doing what is quite innocent, and is not bound to ascertain the character of the letters which are put on board his vessel. Whatever may be thought of this, it may be seriously doubted whether a neutral ship, conveying mails according to usage or the law of its country, can be justly treated as guilty for so doing.

Woolsey, pp. 336, 337.

Despatches not being necessarily noxious, a neutral carrier is not necessarily exposed to a penalty for having made a specific bargain to carry them. He renders himself liable to it only when there is reasonable ground for belief that he is aware of their connexion with the purposes of war.

Hall, p. 699.

A neutral vessel becomes liable to the penalty appropriate to the carriage of persons in the service of a belligerent \* \* \* when the persons on board are such in number, importance, or distinction, and at the same time the circumstances of their reception are such, as to create a reasonable presumption that the owner or his agent intend to aid the belligerent in his war. \* \* \*

In the transport of persons in the service of a belligerent, the essence of the offence consists in the intent to help him; if therefore this intent can in any way be proved, it is not only immaterial whether the service rendered is important or slight, but it is not even necessary that it shall have an immediate local relation to warlike operations. It is possible for a neutral carrier to become affected by responsibility for a transport effected to a neutral port, and it may perhaps be enough to establish liability that the persons so conveyed shall be in civil employment.

Hall, pp. 701, 702.

In the case of [unlawful] transport of despatches or belligerent persons, the despatches are of course seized, the persons become prisoners of war, and the ship is confiscated.

Hall, p. 702.

Despatches, on the other hand, being things, present a real analogy to contraband: they might have been classed as such, but for the attention having been concentrated on the commercial aspect of contraband. As early as the year 1636 the right of the French to visit English ships, in order to prevent the carriage of their enemies' "advices and directions," was admitted. The rule is that carrying the despatches of the enemy government, unless the master can show that he was justifiably ignorant of their noxious character, is a cause of confiscation for the ship, and for the cargo so far as belonging to the owners of the ship. \* \* \* An exception is made for despatches sent in order to maintain communication between the enemy state and neutral ones, for such communication is the right of the neutral states, however valuable it may be to the enemy. \* \* \*

Where the despatches which under the general rules thus far laid down would be ranked as noxious are carried in neutral mail bags, they now have the protection of the Hague regulations as to postal correspondence at sea, above, pp. 184, 185; but it may be interesting to show how far opinion had already called for that protection. I therefore retain what in the first edition of this work was said of despatches so circumstanced, namely that it is worthy of serious consideration whether those general rules at all apply to them. Since neither the master nor the owners of a ship have any knowledge of the contents of a mail bag put on board her by a postoffice, the guilty knowledge or *mens rea* necessary for the condemnation of

the ship must always be wanting in that case. There can therefore be no justification for bringing in the ship for adjudication, on the sole ground of her carrying such bags; and examination of the bags on board her without bringing her in cannot be justified. During the American civil war mail bags found in ships searched on suspicion of blockade-running or carrying contraband were the subject of correspondence between the British and United States governments. Earl Russel wrote, 10 October 1862:

Her Majesty's government cannot doubt that the government of the United States are prepared to concede that all mail bags, clearly certified to be such, shall be exempt from seizure or visitation, or that some arrangement shall be made for immediately forwarding such bags to their destination, in the event of the ship which carries them being detained. If this is done, the necessity for discussing the claim, as a matter of strict right, that Her Majesty's mails on board a private vessel should be exempted from visitation or detention, might be avoided.

Mr. Seward, by way of reply, gave the following directions, addressed to the Secretary of the Navy, 31 October 1862:

It is thought expedient that instructions be given to the blockading and naval officers that, in case of capture of merchant-vessels suspected or found to be vessels of the insurgents or contraband, the public mails of any friendly or neutral power, duly certified and authenticated as such, shall not be searched or opened, but be put as speedily as may be convenient on their way to their designated destinations. This instruction however will not be deemed to protect simulated mail bags, verified by forged certificates or counterfeited seals.

Westlake, vol. 2, pp. 304-306.

When a neutral ship has not placed herself in such a relation to a belligerent government as to be virtually in its service, and has a belligerent's men or despatches on board her, either by special contract or because advantage has been taken of her functions as a regular passenger ship or of the mail bags which she carries, the question as it affects men must be kept separate from that concerning despatches. Men present no real analogy to contraband, although they as well as despatches are often spoken of as its analogues. Men cannot be forwarded like goods, in pursuance of an intention formed about them by some one else. All that can be done is to give them facilities for locomotion, and the question is what facilities of the kind the customary law of nations does not allow a neutral ship to afford. Accordingly the carriage of men has not been usually coupled in treaties with the carriage of contraband but with the clauses stipulating the rule "free ships free goods," in which it is common to find it laid down that the freedom of the flag covers all persons on board except those in the enemy's military service. And by the resolutions of the Institute of International Law on "transport service", which it passed at the same time as those on contraband, the only persons whom it is forbidden to neutrals to carry are those in a belligerent's military service and his diplomatists credited to his ally. The British Admiralty *Manual* includes in the prohibition "civil officials sent out on the public service and at the public expense."

The persons carried in the *Orozembo* were three military men and two going to be employed in civil capacities in a colonial government of the enemy. Lord Stowell did not feel it necessary to deter-

mine whether the principle on which he condemned her would apply to the latter alone, but he thought it reasonable that it should apply whenever the enemy thought it worth while to send out such persons at the public expense. I agree in theory, and that condemnation of the ship should follow, when the enemy has sent out the persons, military or civil, by special arrangement. But that is a case no longer likely to happen, so abundant have regular passenger ships become in all seas.

Westlake, vol. 2, pp. 302, 303.

The assimilation of the ship in the cases described \* \* \* [in article 45, Declaration of London] to "a neutral vessel liable to confiscation for carriage of contraband" means much. Her non-contraband cargo, if she has any, will be secure, unless it belongs to her owner or is less than half of her total cargo. Her liability to capture ceases at the termination of her voyage; and as a neutral vessel she cannot be destroyed at sea, unless her preservation would endanger the safety of the capturing war-ship, or the success of the operations on which it was engaged at the time. Moreover, she has a full right of appeal to the International Prize Court from the decisions of the national tribunals before which she is taken at first.

Lawrence, p. 730.

The Declaration of London gave the world for the first time a coherent law of unneutral service. There is general agreement that some measure of punishment is necessary in order to deter neutral individuals from the performance of acts which are distinctly unneutral in their character, and yet not of a kind which their governments are bound to prevent. Some are trivial; but some fall little short of actual participation in the war without open enrollment in a belligerent fighting force. Moreover, the conditions of modern warfare are causing a rapid increase in the numbers of such acts, especially as regards naval matters. No fleet can now keep the seas without a long train of auxiliary vessels; and neutrals are often engaged in supplying fuel, executing repairs, laying cables, and many other matters most of which were unknown half a century ago. In the old days unneutral service was largely concerned with the carriage of despatches in ships, which can hardly be regarded as a source of liability since the Hague Conference of 1907 exempted mailbags from belligerent search. The transport of persons in the war-like service of the enemy was another great head of offence. It still remains, but is largely modified by the constant obligation of military service, the frequency and ease of emigration, and the existence of an enormous passenger traffic carried on by great ocean liners. The old cases were few in number, and the rules laid down in them, besides being by no means exhaustive, did not respond to modern needs. It was necessary to evolve, from them and from the equities of the case, a chapter of law applicable to present conditions, and so expressed that it could cover the new points that may be expected to arise with startling frequency. This task the Naval Conference of 1908-1909 performed successfully.

Lawrence, p. 726, 727.

Before the Declaration of London the term *unneutral service* was used by several writers with reference to the carriage of certain persons and despatches for the enemy on the part of neutral vessels. The term has been introduced in order to distinguish the carriage of persons and despatches for the enemy from the carriage of contraband, as these were often confounded with each other. Since contraband consists of certain goods only and never of persons or despatches, a vessel carrying persons and despatches for the enemy is not thereby actually carrying contraband. And there is another important difference between the two. Carriage of contraband need not necessarily, and in most cases actually does not, take place in the direct service of the enemy. On the other hand, carriage of persons and despatches for the enemy always takes place in the direct service of the enemy, and, consequently, represents a much more intensive assistance of, and a much more intimate connection with, the enemy than carriage of contraband. For these reasons a distinct treatment of carriage of contraband, on the one hand, and carriage of persons and despatches, on the other, was certainly considered desirable by many publicists. Those writers who did not adopt the term *unneutral service*, on account of its somewhat misleading character, preferred the expression *analogous of contraband*, because in practice maritime transport for the enemy was always treated in analogy with, although not as, carriage of contraband.

Oppenheim, vol. 2, pp. 515-516.

**Contra to some extent.—Carriage of persons for the Enemy.**

Either belligerent may punish neutral vessels for carrying, in the service of the enemy, certain persons.

Such persons included, according to the customary rules of International Law hitherto prevailing, not only members of the armed forces of the enemy, but also individuals who were not yet members of the armed forces but who would have become so as soon as they reached their place of destination, and, thirdly, non-military individuals in the service of the enemy either in such a prominent position that they could be made prisoners of war, or who were going abroad as agents for the purpose of fostering the cause of the enemy. Thus, for instance, if the head of the enemy State or one of his cabinet ministers fled the country to avoid captivity, the neutral vessel that carried him could have been punished, as could also the vessel carrying an agent of the enemy sent abroad to negotiate a loan and the like. However, the mere fact that enemy persons were on board a neutral vessel did not in itself prove that these persons were carried by the vessel for the enemy and in his service. This was the case only when either the vessel knew of the character of the persons and nevertheless carried them, thereby acting in the service of the enemy, or when the vessel was directly hired by the enemy for the purpose of transport of the individuals concerned. Thus, for instance, if able-bodied men booked their passages on a neutral vessel to an enemy port with the secret intention of enlisting in the forces of the enemy, the vessel could not be considered as carrying persons for the enemy; but she could be so considered if an agent of the enemy openly booked their passages. Thus, further,

if the fugitive head of the enemy State booked his passage under a false name, and concealed his identity from the vessel, she could not be considered as carrying a person for the enemy; but she could be so considered if she knew whom she was carrying, because she was then aware that she was acting in the service of the enemy.

Oppenheim, vol. 2, pp. 521, 522.

#### Transmission of Intelligence.

Either belligerent may punish neutral merchantmen for transmission of intelligence to the enemy.

According to customary rules hitherto in force, either belligerent might punish neutral vessels for the carriage of political despatches from or to the enemy, and especially for such despatches as were in relation to the war. But to this rule there were two exceptions. Firstly, on the ground that neutrals have a right to demand that their intercourse with either belligerent be not suppressed: a neutral vessel might not, therefore, be punished for carrying despatches from the enemy to neutral Governments, and *vice versa*, and, further, despatches from the enemy Government to its diplomatic agents and consuls abroad in neutral States, and *vice versa*. Secondly, on account of article 1 of Convention XI., by which postal correspondence is inviolable, except in the case of violation of blockade, the correspondence destined for, or proceeding from, the blockaded port. However, the mere fact that a neutral vessel had political despatches to or from the enemy on board did not by itself prove that she was carrying them *for and in the service of the enemy*. Just as in the case of certain enemy persons on board, so in the case of despatches, the vessel was only considered to be carrying them in the service of the enemy if either she knew of their character and had nevertheless taken them on board, or if she was directly hired for the purpose of carrying them.

Oppenheim, vol. 2, pp. 521, 522.

#### Interpretation of "transmission of intelligence."

The conception "transmission of intelligence" is not defined by the Declaration of London. It certainly means not only oral transmission of intelligence, but also the transmission of despatches containing intelligence. The transmission of any political intelligence of value to the enemy, whether or no the intelligence is in relation to the war, must be considered unneutral service, the case excepted in which intelligence is transmitted from the enemy to neutral Governments, and *vice versa*, and, further, from the enemy Government to its diplomatic agents and consuls abroad in neutral States. And it must be emphasized that, although a vessel may be seized and punished for unneutral service, according to article 1 of Convention XI. of the Second Hague Peace Conference the postal correspondence of neutrals or belligerents, whatever its character, found on board is inviolable.

Oppenheim, vol. 2, pp. 523, 524.

According to customary rules hitherto prevailing, as well as according to the Declaration of London, a neutral vessel may be captured if visit or search establish the fact, or grave suspicion of the

fact, that she is rendering unneutral service to the enemy. And such capture may take place anywhere throughout the range of the Open Sea and the territorial maritime belt of either belligerent.

Oppenheim, vol. 2, p. 526.

#### Mail steamers not exempt from capture.

Stress must be laid on the fact that mail steamers are on principle not exempt from capture for unneutral service. Although, according to article 1 of Convention XI., the postal correspondence of belligerents as well as of neutrals, whatever its official or private character, found on board a vessel on the sea is inviolable, and a vessel may never, therefore, be considered to be rendering unneutral service by carrying amongst her postal correspondence despatches containing intelligence for the enemy, a mail steamer is nevertheless—see article 2 of Convention XI.—not exempt from the laws and customs of naval war respecting neutral merchantmen. A mail boat is, therefore, quite as much as any other merchantman, exposed to capture for rendering unneutral service.

Oppenheim, vol. 2, pp. 526–527.

#### When capture allowed.

However this may be, capture is allowed only so long as the vessel is *in delicto*, that is during the time in which she is rendering the unneutral service concerned or immediately afterwards while she is being chased for having rendered unneutral service. A neutral vessel may not, therefore, be captured after the completion of a voyage specially undertaken for the purpose of transporting members of the armed forces of the enemy, or of transmitting intelligence for the enemy, or after having disembarked the military detachment of the enemy and the persons directly assisting the operations of the enemy in the course of the voyage whom she was transporting. And it must be specially emphasized that even such neutral vessel as had acquired—see article 46 of the Declaration of London—enemy character by rendering unneutral service, ceases to be *in delicto* after her unneutral service has come to an end. Thus, for instance, a neutral vessel which took a direct part in hostilities may not afterwards be captured, nor may a vessel which has disembarked the agent of the enemy Government under whose orders or control she was navigating.

Oppenheim, vol. 2, p. 527.

A commander should detain any neutral vessel which is being actually used as a transport for the carriage of soldiers or sailors by the enemy.

The vessel should be detained, although she may have on board only a small number of enemy officers; or even of civil officials sent out on the public service of the enemy, and at the public expense.

The carriage of ambassadors from the enemy to a neutral state, or from a neutral state to the enemy, is not forbidden to a neutral vessel, for the detention of which such carriage is therefore no cause.

It will be no excuse for carrying enemy military persons that the master is ignorant of their character.

It will be no excuse that he was compelled to carry such persons by duress of the enemy.



A vessel which carries enemy military persons becomes liable to detention from the moment of quitting port with the persons on board, and continues to be so liable until she has deposited them. After depositing them the vessel ceases to be liable.

The commander will not be justified in taking out of a vessel any enemy persons he may have found on board, and then allowing the vessel to proceed; his duty is to detain the vessel and send her in for adjudication, together with the persons on board.

The penalty for carrying enemy military persons is the confiscation of the vessel and of such part of the cargo as belongs to her owner.

Holland, pp. 25, 26.

A commander should detain any Neutral Vessel which has on board Enemy's Despatches.

By the term "Enemy's Despatches" are meant any Official Communications, important or unimportant, between Officers, whether Military or Civil, in the service of the Enemy on the public affairs of their Government.

But to this rule there is one exception, namely:—Official communications between the Enemy's home Government and the Enemy's Ambassador or Consul resident in a Neutral State. Such communications are permissible on the presumption that they concern the affairs of the Neutral State, and therefore are of a pacific character.

Official communications between the Enemy and Neutral Foreign Governments are under no circumstances ground for Detention.

It will be no excuse for carrying Despatches that the Master is ignorant of their character.

It will be no excuse that he was compelled to carry the Despatches by Duress of the Enemy.

The Mail-bags carried by Mail Steamers will not, in the absence of Special Instructions, be exempt from search for Enemy Despatches.

A vessel which carries Enemy's Despatches becomes liable to Detention from the moment of quitting port with the Despatches on board, and continues to be so liable until she has deposited them. After depositing them the Vessel ceases to be liable.

The Commander will not be justified in taking out of a Vessel any Enemy's Despatches he may have found on board, and then allowing the Vessel to proceed; his duty is to detain the Vessel and send her in for Adjudication, together with the Despatches on board.

The Penalty for carrying Enemy's Despatches is the Confiscation of the Vessel and such part of the Cargo as belongs to her Owner.

Holland, pp. 27 and 28.

Merchant-vessels of a neutral nationality are liable to confiscation as prizes in the following cases:—

(1) When such vessels are found conveying to the enemy or to an enemys' port—

\* \* \* \* \*

(c) Military forces of the enemy; provided that in all these cases it is not proved that the masters of the vessels concerned were unaware of the declaration of war; \* \* \*

Russian Regulations, 1895. Article 11.

A neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure. Mail steamers under neutral flags carrying such dispatches in the regular and customary manner, either as a part of their mail in their mail bags, or separately as a matter of accommodation and without special arrangement or remuneration, are not liable to seizure and should not be detained, except upon clear grounds of suspicion of a violation of the laws of war with respect to contraband, blockade, or unneutral service, in which case the mail bags must be forwarded with seals unbroken.

U. S. Naval War Code, 1900, Article 20.

The following acts, forbidden to neutrals, are assimilated to contraband of war: The transport of the enemy's troops, of his despatches and correspondence, the supply of transports and war-ships to the enemy. Neutral vessels captured in the act of carrying contraband of this nature may, according to circumstances, be seized, and even confiscated.

Russian Rules, 1904, sec. 7.

#### Extension of rule.

A ship in regard to which there is good reason to believe that she is scouting or conveying information for the benefit of the hostile State, or that her conduct is clearly such as to assist the enemy in some other way, and that portion of her cargo which belongs to her owner, shall be condemned.

Japanese Regulations, 1904, Article 47.

48. A neutral ship renders the enemy unneutral service when she  
(a) carries out the voyage, departing from usual employment expressly for the purpose of conveying persons enrolled in the hostile forces, or for carrying information in the interest of the enemy.

(b) with knowledge of the owner, charterer, or master, has on board a complete subdivision of enemy troops, or one or more persons who will assist the enemy's operations during the voyage.

The captain is among other things empowered to assume this when a ship equipped with radio-telegraphic apparatus is clearly found to be engaged in the transmission of war information within the area of operations and does not comply with an express prohibition.

49. Reservists, recruits, and war volunteers proceeding to their places of mustering in are not to be regarded as "persons enrolled in the hostile forces."

50. By "transmission of information" is meant any communicating of information, whether written or oral, or by signal or radio-telegraphy.

51. So long as the circumstances named in 48 exist, the ship is liable to capture and confiscation.

Of the cargo, only the merchandise belonging to the owner of the ship is confiscable. Concerning the law for seizure without bringing in the ship, see 121.

52. The provisions of No. 51 do not apply if the ship when visited had no knowledge of the outbreak of hostilities, or when the master after acquiring such knowledge had not been able to disembark the persons carried.

Concerning the question whether such knowledge exists, see 45, (a) and (b)

German Prize Rules, 1909. Articles 48-52.

**Treatment of passengers and crew of captured vessel.**

101. If a neutral ship is captured \* \* \* under 51, for unneutral service, the entire crew—including the Master and officers—will be released unconditionally.

102. The release will be accomplished by discharge from on board when the prize is delivered. The necessary witnesses are however to be held. The names of the conditionally released enemy and neutral persons are to be reported direct to the Chief of Admiral Staff, for communication to the hostile power.

103. Passengers on board captured ships are to be left free from restraint and with the exception of necessary witnesses are to be released as soon as practicable.

German Prize Rules, 1909, Articles 101-103.

Sections 55, 56, 57, and 58. French Naval Instructions, 1912, are substantially identical with Article 45, Declaration of London.

Article 45, Declaration of London, is substantially identical with section 25, Austro-Hungarian Manual, 1913.

On September 14, 1847, Mr. Buchanan, Secretary of State, instructed Mr. Bancroft, American minister at London, to bring to the notice of the British Government the action of Captain May, of the British mail steamer *Teriot*, who had brought from Havana to Vera Cruz General Paredes, the late President of Mexico, who was, said Mr. Buchanan, "the chief author of the existing war between that Republic and the United States," and "the avowed and embittered enemy" of the latter. Knowing, as Captain May must have known, that General Paredes would exert all his influence to prolong and exasperate the war, it was, declared Mr. Buchanan, truly astonishing that he "should have brought this hostile Mexican general, under an assumed name, on board of a British mail steamer, to Vera Cruz, and aided or permitted him to land clandestinely, for the purpose of rushing into the war against the United States." Mr. Buchanan said that the President had not yet determined on the course he would pursue in regard to British mail steamers, but he would be justified in withdrawing from them the privilege which had been granted of entering the port of Vera Cruz. He would not, however, immediately resort to that extreme measure, since he was convinced that the British Government would at once adopt efficient measures to prevent such a violation of their neutrality in the future. "British mail steamers," said Mr. Buchanan, "can not be suffered to bring to Vera Cruz either Mexican citizens or the subjects of any other nation, for the purpose of engaging in the existing war on the part of Mexico against the United States. A neutral vessel which carries a Mexican officer of high military rank to Mexico, for the purpose of taking part in hostilities against our country, is liable to confiscation, according to the opinion of Sir William Scott, in the case of the *Orozemba* (6 Robinson's Reports, 430), and this even although her captain and officers were ignorant that they had such

a person on board." In conclusion, Mr. Buchanan instructed Mr. Bancroft to acquaint Lord Palmerston with the circumstances of the case, and if it should turn out that Captain May or any of his officers were officers in the British service, to ask for their dismissal or for such other punishment as would clearly manifest their Government's disapproval of their conduct.

Mr. Bancroft brought the case to the attention of Lord Palmerston in the sense of his instructions on October 8, 1847.

On November 16, 1847, Lord Palmerston answered that, the lords commissioners of the admiralty having investigated the affair, her Majesty's Government had informed the directors of the Royal Mail Steam Packet Company, to which the *Teriot* belonged, "that the directors are bound to testify, in a marked manner, their disapproval of Captain May's conduct, in having thus abused the indulgence afforded to the company's vessels by the Government of the United States;" and Lord Palmerston added that the directors of the company had accordingly stated that they would immediately suspend Captain May from his command and that they publicly and distinctly condemned any act on the part of their officers which might be regarded as a breach of faith towards the Government of the United States, or as an infringement or invasion of the regulations established by the United States officers in those parts of Mexico which were occupied by the forces of the United States.

Moore's Digest, vol. vii, pp. 752-754; Mr. Buchanan, Secretary of State, to Mr. Bancroft, minister to England, September 14, 1847; Mr. Bancroft, minister to England, to Lord Palmerston, British foreign secretary, October 8, 1847; Lord Palmerston to Mr. Bancroft, November 16, 1847.

"The voyage of the *Haytian Republic* was commenced on October 4 from the United States, with peaceful and lawful intent, and with no knowledge of Haytian disorders or desire to mingle in Haytian disputes.

"On her voyage from Port de Paix to Gonaïves, on October 15-16; from Gonaïves to Miragoâne, on October 16-17; and from the latter port to Aux Cayes, on October 17-18, it is true that she transported as passengers persons variously armed, and, as is supposed, in sympathy with those in possession of the districts in which the ports above named are situated. In such transportation she met with no interference or protest, and merely acted as a common carrier of passengers whom she found awaiting transportation in the ports at which she traded. Such action can not be regarded as constituting complicity in Haytian disorders; and, at the time that the vessel was seized by the *Dessalines* in the service of Provisional President Légitime, at Port au Prince, the persons whom she had thus carried had been left at their ports of destination and she was proceeding on her voyage."

Mr. Bayard, Secretary of State, to Mr. Preston, Haytian minister, November 28, 1888, For. Rel. 1888, 1, 1001, 1005.

#### Exception.

*The "Rapid," Edwards, 228.*—This was the case of an American ship bound for a Dutch port and having on board a despatch to the Dutch Colonial Minister at The Hague, addressed under cover to a commercial house.

Held that the special circumstances of the concealed nature of the communication and the apparent genuine ignorance of the master

took the case out of the regular rule prohibiting neutral masters from carrying despatches of an enemy.

However, it was said that any neutral carrying despatches from a hostile port could not plead ignorance; and that any neutral carrying despatches to a hostile port must expect to lay himself open to grievous annoyance and vexation.

**Consular despatches not necessarily noxious.**

*The "Madison," Edwards, 224.*—The court said: "Now I am of opinion, that a communication from the Danish Government to its own consul in America, does not necessarily imply anything that is of a nature hostile or injurious to the interests of this country. It is not to be so presumed; such communications must be supposed to have reference to the business of the consul-general's office, which is to maintain the commercial relations of Denmark with America. If such communications were interdicted the functions of the official persons would cease altogether. \* \* \*"

**Neutral vessels can not plead duress as a justification for unneutral service.**

*The "Carolina," 4 C. Rob., 256.*—This was the case of a Swedish vessel, captured by the British, and lost in the possession of the captors, before adjudication. The owners petitioned for redress.

The vessel had carried a detachment of French troops to Alexandria, but the master claimed that he acted under duress in so doing.

The petition was rejected and the court said: "If an act of force, exercised by one belligerent on a neutral ship or person, is to be deemed a sufficient justification for any act done by him contrary to the known duties of the neutral character there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act."

*The "Atlanta," 6 C. Rob., 440.*—This was the case of the capturing of a Bremen ship, while on a voyage from Batavia to Bremen, having touched last at the Isle of France, where the master and one of the supercargoes had taken on board a package containing despatches from the Government of the Isle of France to the Minister of Marine at Paris. This package was found concealed in the possession of the second supercargo.

Held that the vessel and cargo were subject to condemnation.

*The "Friendship," 6 C. Rob., 421.*—This was a case of an American vessel bound to Bordeaux, with a small amount of cargo and ninety passengers, being French mariners, the arrangements for whose shipping appeared to have been made by the French minister to the United States.

The court found that the case was "of a vessel letting herself out in a distinct manner, under a contract with the enemy's government, to convoy a number of persons, described as being in the service of the enemy, with their military character traveling with them, and to restore them to their own country in that character.

Therefore, the court pronounced the vessel and cargo subject to condemnation.

*The "Atalanta," 6 C. Rob., 440.*—This was the case of a neutral ship which carried, under circumstances held to be of a fraudulent

concealment, official despatches from enemy colonial authorities to enemy home authorities.

The vessel was condemned.

See also the similar cases of the *Constantia*, *Susan*, and *Hope*, 6 C. Rob., 440, note.

#### Despatches of a public minister privileged.

*The "Caroline,"* 6 C. Rob., 461.—In this case, an American ship was captured while carrying to France, then at war with Great Britain, despatches from the French Minister to the United States, which related to the relations between the United States government and France. The ship was not specially chartered for the purpose of carrying such despatches. The ship was restored and it appears to have been held that the despatches were privileged because of the immunity of ambassadors.

[In Dana's notes to Wheaton the following doctrines are deduced from the decisions of the British Prize Courts]:—

(1) If a vessel is in the actual service of the enemy as a transport, she is to be condemned. In such case, it is immaterial whether the enemy has got her into his service by voluntary contract, or by force or fraud. It is also, in such case, immaterial what is the number of the persons carried, or the quantity or character of the cargo; and, as to despatches, the court need not speculate upon their immediate military importance. It is also unimportant whether the contract, if there be one, is a regular letting to hire, giving the possession and temporary ownership to the enemy, or a simple contract of affreightment. The truth is, if the vessel is herself under the control and management of the hostile government, so as to make that government the owner *pro tempore*, the true ground of condemnation should be as *enemy's property*. The interpretation of this technical phrase of prize law will cover all such cases; and it would have saved some mistaken deductions, if the *Carolina*, *Friendship*, and *Orozembo* had been condemned on that ground, in terms.

(2) If a vessel is not in the enemy's service, still, if the master knowingly takes for the enemy's government, or its agents, persons or papers of such a character and destination that the transporting of them under the neutral flag is an actual belligerent service to the State, it is an unneutral act, which forfeits the vessel. If he avers ignorance of the character of the persons or papers, all the circumstances are to be considered, for the purpose of determining, not only the truth of his averment, but whether his ignorance, though real, is excusable. He is bound to a high degree of diligence, in such cases; and, if the circumstances fairly put him on inquiry, which he does not properly pursue, he will not be excused. Among these circumstances are, the character of the despatch, as far as shown from itself, its source, its destination, the circumstances attending its delivery or custody, and the character of the ports of departure and destination of the vessel, as being neutral or hostile. In a case of a vessel not in the enemy's service, but doing such acts for his benefit, can she be said to be enemy's property *pro hac vice*? In the *Tulip* (Washington's Rep. iii. 181), an American vessel, during the war with England, carrying despatches from a British Minister to his own government from a neutral port under a safe-conduct, agreeing to put them on board some homeward-bound British vessel, was held to be, *pro hac*

*vice*, enemy's property; but, in that case, the vessel, being American, was condemnable for traitorously aiding the enemy, and the form of condemnation was of little consequence.

(3) It is not an unneutral intervention, entailing a penalty, for a neutral to knowingly carry a despatch of a character recognized as diplomatic, in the international intercourse of States. Of this class, is a despatch passing either way between the enemy's home-government and its diplomatic agent in a neutral country, or between a neutral government and its diplomatic agent in an enemy's country; and consuls-general come within the privilege of this rule. But, if the despatches are placed in a private vessel of the nation with which the ambassador's nation is at war, and she is captured by a cruiser of the former nation, the despatches have no immunity. (Tulip, Washington's Rep. iii, 181.)

The above are the principles laid down by the English prize courts, and adopted by the British Government, which no other prize courts have overruled, and no national acts of other States, in the way of treaties or permanent orders, have disclaimed.

Dana's Wheaton, Note 228.

#### Not unlawful to carry invalid soldiers.

*Vasse v. Ball*, 2 Dallas, 270.—In this case, the court said he had "never heard of any law, in any civilized nation, that deemed it contraband or unlawful to carry a few, unarmed, invalid soldiers, to a neutral country, in pursuit of health and refreshment."

#### Carriage of ordinary correspondence from neutral ports not unlawful.

*The "Calchas," Russian and Japanese Prize Cases*, vol. 1, p. 118.—This was the case of a British vessel on a voyage from Tacoma to Liverpool, *via* Japanese ports and carrying a large amount of mail for Japan.

The Prize Courts said that in view of the Regulations of the Universal Postal Union, the carriage of ordinary correspondence from neutral ports would not alone be sufficient ground for regarding a neutral as having rendered assistance to one of the belligerents to the injury of the other. Moreover, the correspondence in question on being examined, proved to contain no information likely to influence the progress of the operations of the navy or fleet. Therefore, the Court held the vessel was not liable to condemnation for carrying correspondence to the enemy.

See also *The St. Kilda*, *Russian and Japanese Prize Cases*, vol. 1, p. 188.

*The "Nigretia," Russian and Japanese Prize Cases*, vol. 2, p. 201.—In 1904, the British steamer *Nigretia*, while on a voyage to Vladivostock, carried as passengers two Russian officers, who had assumed German names. The captain of the vessel swore that he did not know that these passengers were Russian officers; but, on the other hand, the Japanese Prize Court found that both he and the charterer were privy to the carriage, and the court held that the ship "must be confiscated as the vessel was actually engaged in transporting contraband persons."

*Cargo Ex "Nigretia," 2 Russian and Japanese Prize Cases*, vol. 2, p. 213.—Cargo belonging to the charterer of a vessel condemned because of unneutral act of vessel for which he arranged.

CONDEMNATION OF NEUTRAL VESSEL AND GOODS OF OWNER BECAUSE OF SPECIFIED UN-  
NEUTRAL SERVICE NOT COVERED BY ARTICLE 45, DECLARATION OF LONDON.

A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel:

- (1) If she takes a direct part in the hostilities;
- (2) If she is under the orders or control of an agent placed on board by the enemy Government;
- (3) If she is in the exclusive employment of the enemy Government;
- (4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

In the cases covered by the present Article, goods belonging to the owner of the vessel are likewise liable to condemnation.—*Declaration of London, Article 46.*

In the more serious cases which belong to the second class (art. 46), the vessel is again condemned; but further, she is treated not only as a vessel subject to condemnation for carrying contraband, but as an enemy merchant vessel, which treatment entails certain consequences. The rules governing the destruction of neutral prizes do not apply to the vessel, and as she has become an enemy vessel, it is no longer the second but the third rule of the declaration of Paris which is applicable. The goods on board will be presumed to be enemy goods; neutrals will have the right to claim their property on establishing their neutrality (art. 59). It would, however, be going too far to say that the original neutral character of the vessel is completely lost, so that she should be treated as though she had always been an enemy vessel. The vessel may plead that the allegation made against her has no foundation in fact, that the act of which she is accused has not the character of unneutral service. She has, therefore, the right of appeal to the international court in virtue of the provisions which protect neutral property.

The cases here contemplated are more serious than those in article 45, which justifies the severer treatment inflicted on the vessel, as explained above.

*First case.*—The vessel takes a direct part in the hostilities. This may take different forms. It is needless to say that, in an armed conflict, the vessel takes all the risks incidental thereto. We suppose her to have fallen into the power of the enemy whom she was fighting, and who is entitled to treat her as an enemy merchant vessel.

*Second case.*—The vessel is under the orders or control of an agent placed on board by the enemy government. His presence marks the relation in which she stands to the enemy. In other circum-



stances the vessel may also have relations with the enemy, but to be subject to condemnation she must come under the third head.

*Third case.*—The whole vessel is chartered by the enemy government, and is therefore entirely at its disposal; it can use her for different purposes more or less directly connected with the war, notably, as a transport; such is the position of colliers which accompany a belligerent fleet. There will often be a charter party between the belligerent government and the owner or master of the vessel, but all that is required is proof, and the fact that the whole vessel has, in fact, been chartered is enough, in whatever way it may be established.

*Fourth case.*—The vessel is at the time exclusively devoted to the carriage of enemy troops or to the transmission of intelligence in the enemy's interest. The case is different from those dealt with by article 45, and the question is one of a service to which the ship is permanently devoted. The decision accordingly is that, so long as such service lasts, the vessel is liable to capture, even if, at the moment when an enemy cruiser searches her, she is engaged neither in the transport of troops nor in the transmission of intelligence.

As in the cases in article 45 and for the same reasons, goods found on board belonging to the owner of the vessel are also liable to condemnation.

It was proposed to treat as an enemy merchant vessel a neutral vessel making, at the time, and with the sanction of the enemy government, a voyage which she has only been permitted to make subsequently to the outbreak of hostilities or during the two preceding months. This rule would be enforced notably on neutral merchant vessels admitted by a belligerent to a service reserved in time of peace to the national marine of that belligerent—for instance, to the coasting trade. Several delegations formally rejected this proposal, so that the question thus raised remains an open one.

Report of committee which drafted Declaration of London.

The prize court cannot condemn enemy or neutral prizes except on the following grounds:

1. Prohibited transportation in time of war.

\* \* \* \* \*

4. Participation in the hostilities of the belligerents by private vessels.

Institute, 1887, p. 76.

In case where a private vessel participates in the hostilities of belligerents, it is necessary that the participation be proved and recognized as such.

Institute, 1887, p. 76.

The vessel shall be condemned with its cargo:

\* \* \* \* \*

3. In case of participation in the hostilities of belligerents.

Institute, 1887, p. 77.

Any act of positive hostility on the part of a neutral state toward one of the belligerents in a war, is deemed a breach of neutrality, and makes such a state a party in the war. \* \* \* The rule is

equally applicable to the citizens and subjects of a neutral state. So long as they faithfully perform the duties of neutrality, they are entitled to the rights and immunities of that condition. But for every violation of neutral duties, they are liable to the punishment of being treated in their persons or property as public enemies of the offended belligerent.

Halleck, pp. 628, 629.

If a neutral vessel is captured while in the employment of the enemy or his officers, for purposes immediately or mediately connected with the operations of the war, the owner is never permitted to assert his claim. The nature of the service or employment is very justly deemed, in such a case, conclusive evidence of its hostile character. While thus employed the neutral vessel is as truly a vessel of the enemy, as if she were such by documentary title; and the owner is not allowed, for his own protection, to divest her of the character which she has thus assumed. Nor will the prize court listen to the plea that the vessel was impressed into such service by duress and violence. The answer of Sir. Wm. Scott to such a defense, is most conclusive. When threats or force are employed for such a purpose by a belligerent, it is the duty of a neutral master, who has no means of resistance, to surrender his vessel, as a hostile seizure. He has no right, retaining his command, to navigate his vessel as a neutral, in the service and subject to the orders of the enemy. If he surrenders his vessel as a hostile seizure, he may appeal to his government for redress; but if he retain the command he will be treated as an enemy, and his vessel as the property of the belligerent.

Halleck, p. 641.

A neutral vessel becomes liable to the penalty appropriate to the carriage of persons in the service of a belligerent, \* \* \* when the latter has so hired it that it has become a transport in his service and that he has entire control over it; \* \* \*

Hall, p. 701.

If a vessel is so hired by a belligerent that he has entire control over it to the extent of his special needs, the ship itself is confiscable as having acquired an enemy character, \* \* \*

Hall, p. 708.

On July 25, 1894, about 7 a. m., a Japanese squadron, cruising off the Korean coast, before declaration of war, was attacked by Chinese warships which had been convoying reinforcements to Asan. About 9 a. m. the *Kowshing*, a British vessel, carrying further Chinese reinforcements for Asan, appeared on the scene. The Japanese cruiser *Naniwa* signaled her to stop and sent a boat aboard, and, finding that she was carrying 1,200 Chinese troops, with several generals, including the German major von Hanneken, asked the captain to follow the *Naniwa* to Japan. The captain assented, but the Chinese officers by force and threats restrained him. The *Naniwa*, then, after some parleying, warned those on board to quit the vessel, and afterwards fired into and sank her. Most of the Europeans were picked up by the boats of the *Naniwa*. As soon as the facts could be fully ascertained, Professors Holland and Westlake both took the ground,

in the face of much popular excitement, that at the time of the sinking of the *Kowshing* a state of war de facto existed between China and Japan; that the *Kowshing*, as a neutral ship engaged in the transport service of a belligerent, was liable to be visited and taken in for adjudication, with the use of so much force as might be necessary; that, as one of a fleet of transports and men-of-war engaged in carrying reinforcements to the Chinese troops on the mainland, she was clearly part of a hostile expedition, or one which might be treated as hostile, which the Japanese were entitled by all needful force to arrest; that the force used did not appear to be excessive, either for the capture of an enemy's neutral transport or for barring the progress of a hostile expedition, and that, as the rescued officers were duly set at liberty, no apology was due to the British Government and no indemnity to any person.

Holland. *Studies in Int. Law*, 126 et seq. Moore's Digest, Vol. VII, pp. 414, 415.

When a neutral ship is chartered by a belligerent government or its agent for the purpose of conveying men or despatches, she is subject to capture and confiscation as being in belligerent service, so that there is no need to invoke an analogy to the law of contraband, and the importance of the men or despatches conveyed is immaterial. Where the service of a neutral ship was obtained under duress applied by a belligerent, Lord Stowell equally condemned her; but it is widely, and in my opinion justly, thought that this was wrong, since the condemnation cannot operate as a lesson to neutrals in a similar case.

Westlake, vol. 2, p. 302.

#### Scope of Case I.

The first case arises when she takes "a direct part in hostilities." The phrase is broad and wide in order that it may cover many eventualities. It is possible to take part in hostilities without firing a shot. A neutral fishing vessel might show the channel to a fleet advancing to the attack of an enemy squadron, or lay mines or remove them or allow herself to be used for the discharge of torpedoes, or reconnoitre for the enemy, or block wireless messages in his interest. If she did these things under fire, and was injured or destroyed, she would richly deserve her fate. By behavior as an enemy she would forfeit the right to be treated as a neutral. Indeed, it may be questioned whether the penalty of being treated as an enemy merchantman is not too light for some of the possible cases. Ought not, for instance, the whole crew of a fishing boat seized while laying mines for the enemy be detained as prisoners of war, if not shot as unlawful combatants? They must have known that they were performing an act of pronounced hostility, likely to be more beneficial to the side which employed them than any deed of valor done in the course of actual combat.

Lawrence, p. 730, 731.

In these four cases [set forth in Article 46, Declaration of London], as we have already seen, the delinquent vessel is placed in the position of a captured enemy merchantman, which means that all enemy goods will be confiscated, and all goods will be presumed to be enemy

goods till the contrary is proved. The vessel herself may be destroyed at sea without the obligation of compensation which exists when a neutral prize is so disposed of in circumstances which do not amount to extreme necessity. But she does not lose the right of appeal to the International Prize Court.

Lawrence, p. 732.

Merchant vessels of a neutral nationality are liable to confiscation as prizes in the following cases:—

\* \* \* \* \*

(4) When they have taken part in hostile operations of the enemy.

Russian Regulations, 1895, Article 11.

**More stringent rule regarding condemnation of cargo.**

The cargo of merchant-vessels of a neutral nationality is liable to be confiscated as a prize:

\* \* \* \* \*

(2) When the cargo is on board a vessel which is liable to confiscation \* \* \* [because it has taken part in hostile operations of the enemy] and it is not proved that such cargo belongs to Russians, or to neutrals who have taken no part in the infractions entailing confiscation.

Russian Regulations, 1895, Article 12.

Neutral vessels in the military or naval service of the enemy, or under the control of the enemy for military or naval purposes, are subject to capture or destruction.

U. S. Naval War Code, 1900, Article 16.

By enemy ships are meant those enumerated below:—

1. Ships used by the enemy. This rule applies even when the use is the result of intimidation.

2. Ships which sail under the enemy's flag or with a special license from the enemy.

Japanese Regulations, 1904, Article 6.

If a ship is considered to have been equipped for the use of the hostile State for military purposes, that portion of her cargo which belongs to the owner of the ship shall be condemned.

Japanese Regulations, 1904, Article 46.

55. A neutral ship further renders unneutral service to the enemy

(a) when it directly takes part in the hostilities. Against such a ship, force of arms is to be used, until its unneutral procedure ceases;

(b) when it is under the order or control of an agent of the enemy government installed on board the ship;

(c) when it has been chartered by the enemy government;

(d) when it is actually and expressly designated for the transport of enemy troops or transmission of information in the enemy's interest.

This applies, in contrast to 48, not to one particular voyage, but on the contrary to a continued employment of the ship for the particular purpose. So long as such employment exclusively continues, un-

neutral service is rendered, even while the ship lying idle, neither carries troops, nor transmits information.

56. So long as circumstances named in 55 continue, the ship is to be treated as hostile (see 17 to 20).

The merchandise in the cargo belonging to the owner of the ship is also confiscable. Concerning the right to seize the confiscable part of the cargo without bringing in the ship, see 19.

German Prize Rules, 1909, Articles 55, 56.

#### **Treatment of crew and passengers of captured ship.**

If a ship is captured under \* \* \* 55a (taking part in hostilities), those persons who without being enrolled in the enemy forces have taken part in the hostilities or have exerted forcible resistance, may be dealt with according to the customs of war. The other persons of the crew will be made prisoners of war.

German Prize Rules, 1909, Article 99.

#### **Treatment of crew of a captured vessel.**

If a ship is captured \* \* \* under 55, b, c, d, because of un-neutral service, the master, officers and members of the crew—as far as they are of the enemy's nationality,—will not be made prisoners of war, if they bind themselves on the strength of a formal written promise to engage in no service, during the period of the war, that may have any connection with the hostile undertakings of the enemy.

German Prize Rules, 1909, Article 100.

You will likewise capture any neutral vessel:

- (1) If it takes a direct part in the hostilities;
- (2) If it is under the orders or control of an agent placed on board by the enemy government;
- (3) When it is laden in whole or in part by the enemy government;
- (4) When it is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

In the fourth case above specified, the vessel will be liable to confiscation and, in a general way, liable to the same treatment as if it were an enemy merchant ship.

You will notice that the transport of official dispatches can not be wrongful unless done specially; otherwise you will follow out the provisions of Article XVI below.

French Naval Instructions, 1912, secs. 61, 62, and 63.

Article 46, Declaration of London, is substantially identical with section 26, Austro-Hungarian Manual, 1913.

The agents in Venezuela of an American line of steamers, plying between New York and Venezuelan ports and carrying the mails, having on several occasions been applied to by one or the other of the factions contending for power in that country for the use of their vessels for special service out of their regular itinerary, requested the advice of Mr. Scruggs, then United States minister at Caracas. Mr. Scruggs replied: "The ships \* \* \* being registered American

vessels, \* \* \* and being besides under contract with the United States Government for carrying the mails, can not be chartered or otherwise used by anyone of the factions now contending for power in Venezuela without manifest prejudice to their neutral character and to the interests of the United States. It is hoped, therefore, that you will courteously but firmly refuse to allow them to be so used." In acknowledging receipt of the correspondence, the Department of State said: "The Department regards your letter as, under the circumstances, discreet. Avoidance of all interference in local conflicts is very desirable on the part of a mail line, although the suggested service to the titular or *de facto* authorities might not in fact infringe any statute of the United States."

Moore's Digest, vol. vii, pp. 875, 876; Mr. Foster, Secretary of State, to Mr. Scruggs, September 30, 1892, For. Rel. 1892, 627-628, enclosing a letter from the Secretary of the Treasury of September 23, 1892, expressing the opinion, in a case lately before him, that the chartering of an American steamer in Honduras by the President of that Republic for use there against rebels, and the granting her for the time being permission to fly the Honduran flag, did not subject the vessel, or her owners or master, to any penalty or disability under the statutes of the United States. See, also, as to the case in Honduras, For. Rel. 1893, 149-152, and *supra*, sec. 328, II, 1075.

*The "Orozembo,"* 6 C. Rob., 430.—This was the case of an American vessel, ostensibly chartered by a merchant at Lisbon "to proceed in ballast to Macao, and there to take a cargo to America" but afterwards, by his directions, fitted up for the reception of three military officers of distinction and two civil employees of the Batavian Government, who had come from Holland to take passage to Batavia under appointment from the Government of Holland, then at war with Great Britain.

Held that the vessel was subject to condemnation. The court said: "I accede to what has been observed in argument, that number alone is an insignificant circumstance in the considerations, on which the principle of law on this subject is built, since fewer persons of high quality and character may be of more importance, than a greater number of persons of lower condition."

*The "Commercen,"* 1 Wheaton, 382.—In this case the court stated that it was of opinion that if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must to all intents and purposes, be deemed a British transport.

*The "Hart,"* 3 Wall., 559.—In this case, the court said: "Neutrals who place their vessels under belligerent control, and engage them in belligerent trade; or permit them to be sent with contraband cargoes, under cover of false destination, to neutral ports, while the real destination is to belligerent ports; impress upon them the character of the belligerent in whose service they are employed, and the vessels may be seized and condemned as enemy property."

See also, *Darby v. The Erstern*, 2 Dallas, 34; *The Baigorri*, 2 Wall., 474.

*The "International,"* L. R. 3 A. and E. Courts, 321.—In this case the court said that under the municipal law of Great Britain, a ship employed by a foreign belligerent state to lay a submarine cable, the main object of which is, and is known to be, the subserving of the

military operations of the belligerent state, is employed in the military or naval services of that state; but if the main object of the cable is the subserving of the commercial interests of the state, the ship is not so employed.

*The "Industrie," Russian and Japanese Prize Cases, vol. 2, p. 323.*—This was the case of a neutral vessel which was captured after cruising for some days in the neighborhood of the Japanese fleet. She was ostensibly employed in collecting news for a newspaper published by an American in China and had on board a German subject purporting to act as correspondent for the paper, but both he and the master in their evidence before the Court were disposed to accept the suggestions that the ship was under contract of sale to the Russian Government, and that any news obtained would be supplied to the Russian authorities. The Prize Courts mentioned as further suspicious circumstances that the newspaper in question was established at about the opening of the war, expressed Pro-Russian views, and was a small paper which apparently had not sufficient means to send out a ship for its own purposes.

Therefore the courts found that the vessel was, in fact, engaged in obtaining intelligence as to the Japanese fleet for the Russian Government and condemned her.

*The "Quang-Nam," Russian and Japanese Prize Cases, vol. 2, p. 343.*—This was the case of a neutral ship captured in a locality where information as to the Japanese defenses might be obtained. She had previously delivered a cargo to the Russian fleet, had then gone to Shanghai without cargo and there taken on board a further quantity of coal, although she already had more than enough for a voyage to Manila, for which she ostensibly sailed from Shanghai, still without cargo. Her officers testified that they suspected she was chartered by the Russian Government.

Held that the facts showed that the vessel was chartered by the Russian Government and attempted to discover Japanese military secrets. The ship was condemned.

*The "Australia," Russian and Japanese Prize Cases, vol. 2, p. 373.*—This was the case of a neutral ship which was chartered to carry goods belonging partly to the Russian Government and partly to Russian subjects, to ports on the Sea of Okhotsk and the Behring Sea. The cargo was intended in part for the Russian official depots, and in part for the inhabitants. A Russian official, whose duty it was to distribute the goods had been on board during the voyage, but was sick and on shore when the vessel was captured, which was before the expiration of the charter, and while she still had on board some of the cargo in question.

Held that on the above facts the Russian Government was the actual charterer and the ship and cargo were condemned.

**PERSON BELONGING TO ARMED FORCES OF ENEMY, FOUND ON BOARD NEUTRAL VESSEL,  
MAY BE MADE PRISONER OF WAR.**

**Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel.—*Declaration of London, Article 47.***

Individuals embodied in the armed military or naval forces of a belligerent may be on board a neutral merchant vessel when she is searched. If the vessel is subject to condemnation, the cruiser will capture her and take her to one of her own ports with the persons on board. Clearly the soldiers or sailors of the enemy state will not be set free, but will be treated as prisoners of war. Perhaps the case will not be one for the capture of the ship—for instance, because the master was unaware of the status of an individual who had come on board as an ordinary passenger. Must the soldier or soldiers on board the vessel be set free? That does not appear admissible. The belligerent cruiser can not be compelled to set free active enemies who are physically in her power and are more dangerous than this or that contraband article. She must naturally proceed with great discretion, and must act on her own responsibility in requiring the surrender of these individuals, but the right to do so is hers; it has therefore been thought necessary to explain the point.

Report of committee which drafted Declaration of London.

It is likewise agreed that the same liberty be extended to persons who may be on board a free ship, with this effect, that, although they be enemies to both or either of the parties, they shall not be taken out of the free ship, unless they are soldiers in the actual service of the said enemies.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, Article VII.

If one of the contracting parties should be engaged in war with any other Power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent Powers shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy.

Treaty of Amity and Commerce, concluded between United States and Prussia, September 10, 1785, Article XII.



It is also agreed, in like manner, that the same liberty shall be extended to persons who are on board a free ship, with this effect, that although they be enemies to both or either party, they are not to be taken out of that free ship unless they are officers and soldiers and in the actual service of the enemies.

Treaty of Peace, Amity, Navigation and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XV.

The like neutrality shall be extended to persons who are on board a neutral ship with this effect, that although they may be enemies to both or either party, they are not to be taken out of that ship unless they are officers or soldiers, and in the actual service of the enemies.

Treaty of Peace, Friendship, Commerce and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XVI.

It is also agreed, in like manner, that the same liberty be extended to persons who are on board of a free ship; and they shall not be taken out of that free ship unless they are officers or soldiers, and in the actual service of the enemy: \* \* \*

Treaty of Commerce and Navigation concluded between the United States and Italy, February 26, 1871, Article XVI.

The only persons on board the ship which has been seized who shall be considered prisoners of war are those who form part of the military force of the enemy, and those who have assisted the enemy or are suspected of having assisted the enemy.

Institute, 1882, pp. 55, 56.

Of the persons found on board the vessel seized, the members of the enemy military force are immediately sent as prisoners of war to the military authorities of the same or the nearest town, and these authorities place them at the disposition of the court to be heard when demanded by it. Those who have assisted the enemy or are suspected of having assisted the enemy are delivered to the military authorities. The other persons found on board the vessel remain there under surveillance during the period fixed by the court, if and so long as the court of inquiry deems their depositions necessary. If the vessel is sold or destroyed in the port of arrival, those who would have been obliged to remain on board the vessel shall remain under arrest by the authorities until a decision of the court. When the inquiry has been concluded the captain or master and the supercargo are not set at liberty unless bond *judicio sisti* is furnished.

Institute, 1883, p. 60.

\* \* \* troops transported to the enemy shall be made prisoners.

Institute, 1887, p. 77.

\* \* \* the persons and troops illegally transported shall be made prisoners.

Institute, 1897, p. 143.

**Contra.**

This celebrated case [the Trent Case] can be considered as having settled but one principle, and that had substantially ceased to be disputed question; viz., *that a public ship, though of a nation at war,*

cannot take persons out of a neutral vessel at sea, whatever may be the claim of her government on those persons. It is to be borne in mind that Earl Russell, in his demand, makes no reference to the diplomatic character of Mason and Slidell, or to any special right or exemption in this case. He presents the naked case, that a United States ship of war had taken persons from an innocent British neutral vessel at sea. To his reclamation against such a proceeding, the United States were only too glad to assent; considering it as a triumph of their own principles, secured by their own decision, made against a strong national feeling in the particular case, on the demand of the only power that had ever contended for the opposite doctrine.

Beyond this, the Trent case settles nothing. Mr. Seward considered the persons to be contraband of war, from the nature of their office and the position of the power they assumed to represent. This was denied by Earl Russell, and left unsettled. Mr. Seward considered that the *termini* of the voyage of the Trent were immaterial, as the destination of the persons was certain, and she knowingly took them on their way. Earl Russell contends that the neutral *termini* were conclusive in her favor; and this was left unsettled. Earl Russell claimed for private mail-vessels no immunity, but only a more careful consideration. Mr. Seward restores the persons, on the ground that, if a captor relinquishes his prize without necessity, he cannot take persons or cargo out of her as contraband,—a principle well established in the law of nations. But the ground on which the British Government put their demand,—that persons could not be taken out of a neutral vessel by a belligerent, whatever the claim upon them,—must be considered as settling that doctrine in favor of the historical American position, as there is now no nation to call it in question.

Note 228, Dana's Wheaton.

#### Contra.

If on the other hand belligerent persons, whatever their quality, go on board a neutral vessel as simple passengers to the place whither she is in any case bound, the ship remains neutral and covers the persons on board with the protection of her neutral character.

Hall, p. 708.

#### Contra.

When the persons travel as passengers in the ordinary course, it must be remembered that the customary right to capture even military officers has not been accompanied by any relaxation of the duty to send every neutral ship that is interfered with in for adjudication, and that to arrest a passenger liner and send her in for adjudication would be an intolerable nuisance. The duty referred to cannot properly be relaxed, for those who capture the men cannot be allowed to be judges in their own cause, and an adjudication on the ship is the only means of submitting their act to legal decision.

Westlake, vol. 2. pp. 303, 304.

#### Explanation of rule.

The general rule of International Law is that no person can be removed at sea by a belligerent war-ship from a neutral vessel which is herself free from capture. But an exception was made in this

case, in order that "large passenger steamers under a neutral flag should, if possible, be freed from the costly inconvenience of being taken into a prize court and there detained, perhaps for a prolonged period, merely because a few individuals forming part of the armed forces of a belligerent, but whose military status was unsuspected by the owners or captain of the vessel, were among her passengers."

Lawrence, p. 729; Report of British delegation at the Naval Conference, for which see British Parliamentary Papers, Miscellaneous, No. 4 (1909), p. 98.

#### **Interpreted to include despatches.**

The case of despatches found on board is not mentioned by article 47, but there ought to be no doubt \* \* \* that the old customary rule, that, although the vessel may not be condemned because there is no ground for capture, any despatches for the enemy found on board may, in analogy with article 47, be confiscated, provided such despatches are not part of the postal correspondence carried on board.

Oppenheim, vol. 2, p. 528.

According to the practice hitherto prevailing, a neutral vessel captured for carriage of persons or despatches in the service of the enemy could be confiscated. \* \* \* And if the vessel was not found guilty of carrying persons or despatches in the service of the enemy, and was not therefore condemned, the Government of the captor could nevertheless detain the persons as prisoners of war and confiscate the despatches, provided the persons and despatches concerned were in any way of such a character as to make a vessel, which was cognisant of this character, liable to punishment for transporting them for the enemy.

Oppenheim, vol. 2, pp. 527-528.

#### **Contra, as to British and American practice.**

According to the British and American practice, as well as that of some other States, which has hitherto prevailed, whenever a neutral vessel was stopped for carrying persons or despatches for the enemy, these could not be seized unless the vessel were seized at the same time. The release, in 1861, during the American Civil War, of Messrs. Mason and Slidell, who had been forcibly taken off the *Trent*, while the ship herself was allowed to continue her voyage, was based, by the United States, on the fact that the seizure of these men without the seizure of the vessel was illegal.

Openheim, vol. 2, p. 530.

#### **Explanation of rule.**

Since, according to the Declaration of London, a neutral vessel rendering unneutral service of any kind is liable to be confiscated, it is evident that in such a case the enemy persons and despatches concerned may not be taken off the vessel unless the vessel herself is seized and brought into a port of a Prize Court. However, article 47 provides that any member of the armed forces of the enemy found on board a neutral merchant vessel may be taken off and made a prisoner of war, although there may be no ground for the capture of the vessel. Therefore, if a vessel carries individual members of the armed forces of the enemy in the ordinary course

of her voyage,<sup>1</sup> or if she transports a military detachment of the enemy and the like without being aware of the outbreak of hostilities, the members of the armed forces of the enemy on board may be seized, although the vessel herself may not be seized, as she is not rendering unneutral service.

• Openheim, vol. 2, pp. 530-531.

Persons who are contraband of war shall be made prisoners.

By persons who are contraband of war are meant the enemy's troops and all other persons who are being carried for the purpose of being engaged in the military affairs of the hostile state.

Japanese Regulations, 1904, articles 42 and 11.

53. Every person enrolled in the forces of the enemy who is found on board a merchant ship may be made a prisoner of war, even when the ship herself is not liable to capture.

54. Persons who without being enrolled in the enemy forces assist the operations of the enemy directly during the voyage (48 b) may be taken prisoner only upon simultaneously bringing in the ship.

German Prize Rules, 1909. Articles 53 and 54.

Even when the vessel can not be captured, you may make a prisoner of war of any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel.

You will first ask the master of the vessel to hand over these individuals to you. In case of refusal on his part, you will go further and make them prisoners of war. In case of resistance on the part of the personnel of the ship, you will capture the ship.

Religious, medical, and hospital personnel of the enemy found on board a neutral merchant vessel may not be made prisoners of war; but before leaving such personnel at liberty, you will assure yourself carefully of the reality of their character. In case of doubt, you may detain them in the way above indicated until proof of such character is established.

French Naval Instructions, 1912, secs. 59 and 60.

Article 47, Declaration of London, is substantially identical with section 40, Austro-Hungarian Manual, 1913.

*France v. Italy, the "Manouba" case—Permanent Court of Arbitration at The Hague, 1913.*—During the war between Italy and Turkey, in 1912, a French mail steamer, *The Manouba*, on a trip from Marseilles to Tunis was stopped by an Italian man-of-war, which ascertained the presence on board of twenty-nine Turkish passengers,

<sup>1</sup>Accordingly, in January, 1912, during the Turco-Italian War, the Italian gunboat *Voltorno*, after having overhauled, in the Red Sea, the British steamer *Africa* going from Hodeida to Aden, took off and made prisoners of war Colonel Riza Bey and eleven other Turkish officers. Although the Declaration of London is not yet ratified by Great Britain, she did not protest. The case of the *Manouba* ought likewise to be mentioned here. This French steamer, which plies between Marseilles and Tunis, was stopped on January 16, 1912, by an Italian cruiser in the Mediterranean, and twenty-nine Turkish passengers, who were supposed to be Turkish officers on their way to the theatre of war, were forcibly taken off and made prisoners. On the protest of France, the captives were handed over to her in order to ascertain whether they were members of the Turkish forces, and it was agreed between the parties that the case should be settled by an arbitral award of the Permanent Court of Arbitration at the Hague, Italy asserting that she had only acted in accordance with article 47 of the Declaration of London.

suspected of belonging to the Turkish army. *The Manouba* was captured and taken into an Italian port, when the captain was summoned to deliver up the passengers in question but refused to do so, whereupon the vessel was seized. Afterwards, upon the request of the French vice-consul, the captain surrendered the passengers and the vessel was released.

The Court held: (1) that inasmuch as the Italian naval authorities had, at the time of stopping the *Manouba*, sufficient reason to believe that some at least of these passengers were soldiers enlisted in the enemy's army, they had a right to remove them from the vessel.

(2) That inasmuch as there was no reason for calling in question the good faith of the owner or captain of the *Manouba*, the Italian authorities were not within their rights in capturing the vessel and bringing her to the Italian port, except in the case of arrest after the captain had refused a summons to surrender these passengers, which summons was not, as a matter of fact, made before the capture, and

(3) That as the summons for the surrender of the passengers, made in the Italian port, was not obeyed, the Italian authorities had the right to take the necessary measures of compulsion, and to detain the steamer until the delivery of the Turkish passengers; that the seizure effected was legal only to the extent of temporary and conditional sequestration.

The Court decreed:

"The Royal Italian Government shall be obliged within three months from the present award, to pay to the Government of the French Republic the sum of four thousand francs, which, after deducting the amount due the Italian Government for guarding *The Manouba* is the amount of the losses and damages sustained by reason of the capture of the "*Manouba*" and its convoy to Cagliari, by the private individuals interested in the vessel and its voyage."

DESTRUCTION OF CAPTURED NEUTRAL VESSELS FORBIDDEN—EXCEPTIONS—TREATMENT  
OF PERSONS AND DOCUMENTS ON BOARD.

A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.

As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time.

Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship.—*Declaration of London, Articles 48, 49, and 50.*

Comment on general subject.

The destruction of neutral prizes was a subject comprised in the program of the second peace conference, and on that occasion no settlement was reached. It reappeared in the program of the present conference, and this time agreement has been found possible. Such a result, which bears witness to the sincere desire of all parties to arrive at an understanding is a matter for congratulation. It has been shown once more that conflicting hard-and-fast rules do not always correspond to things as they are, and that if there be readiness to descend to particulars, and to arrive at the precise way in which the rules have been applied, it will often be found that the actual practice is very much the same, although the doctrines professed appear to be entirely in conflict. To enable two parties to agree, it is first of all necessary that they should understand each other, and this frequently is not the case. Thus it has been found that those who declared for the right to destroy neutral prizes never claimed to use this right wantonly or at every opportunity, but only by way of exception; while, on the other hand, those who maintained the principle that destruction is forbidden, admitted that the principle must give way in certain exceptional cases. It therefore became a question of reaching an understanding with regard to those exceptional cases to which, according to both views, the right to destroy should be confined. But this was not all; there was need for some guaranty against abuse in the exercise of this right; the possibility of arbitrary action in determining these exceptional cases must be limited by throwing some real responsibility upon the captor. It

was at this stage that a new idea was introduced into the discussion, thanks to which it was possible to arrive at an agreement. The possibility of intervention by a court of justice will make the captor reflect before he acts, and at the same time secure reparation in cases where there was no reason for the destruction.

Such is the general spirit of the provisions of this chapter.

#### Comment on Article 48.

The general principle is very simple. A neutral vessel which has been seized may not be destroyed by the captor; so much may be admitted by everyone, whatever view is taken as to the effect produced by the capture. The vessel must be taken into a port for the determination there as to the validity of the prize. A prize crew will be put on board or not, according to circumstances.

#### Comment on Article 49.

The first condition necessary to justify the destruction of the captured vessel is that she should be liable to condemnation upon the facts of the case. If the captor can not even hope to obtain the condemnation of the vessel, how can he lay claim to the right to destroy her?

The second condition is that the observance of the general principle would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time. This is what was finally agreed upon after various solutions had been tried. It was understood that the phrase *compromettre la sécurité* was synonymous with *mettre en danger le navire*, and might be translated into English by: Involve danger. It is, of course, the situation at the moment when the destruction takes place which must be considered in order to decide whether the conditions are or are not fulfilled. For a danger which did not exist at the actual moment of the capture may have appeared some time afterwards:

Report of committee which drafted Declaration of London.

\* \* \* but in this and all other cases of just detention, the vessel detained shall be sent to the nearest convenient and safe port for trial and judgment according to law.

Treaty of Peace, Amity, Navigation and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XIX.

#### Prize courts.

It is further agreed that in all cases the established courts for prize causes, in the country to which the prizes may be conducted, shall alone take cognizance of them. And whenever such tribunals of either party shall pronounce judgment against any vessel or goods or property claimed by the citizens of the other party, the sentence or decree shall mention the reasons or motives upon which the same shall have been founded, and an authenticated copy of the sentence or decree and of all the proceedings in the case, shall, if demanded, be delivered to the commander or agent of said vessel without any delay, he paying the legal fees for the same.

Treaty of Peace, Amity, Navigation and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XXIV.

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Treaty of Peace, Friendship, Commerce, and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XXIV.

\* \* \* but in this, as well as in all other cases of just detention, the vessel detained shall be sent to the nearest convenient and safe port for trial and judgement according to law.

Treaty of Peace, Friendship, Commerce, and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XIX.

The vessel seized shall be taken to the nearest port of the captor State or to a port of allied Power where a court of inquiry may be found to examine into the matter of the vessel seized.

Institute, 1882, p. 56.

In the following cases the captor will be permitted to burn or sink the enemy vessel which has been seized, after having sent the persons found on board to the warship, and discharged as much as possible of the cargo, and after the commander of the captor vessel has taken charge of the ship's papers and important objects for use in judicial proceedings and settlement of claims of owners of the cargo for damages and interest:

1. When it is impossible to keep the vessel afloat, on account of its bad condition, in a rolling sea;

2. When the vessel sails so poorly that it can not follow the war vessel and may easily be retaken by the enemy;

3. When the approach of a superior force of the enemy arouses the fear that the vessel may be retaken;

4. When the war vessel is unable to put a sufficient crew upon the vessel which has been seized without diminishing too greatly the crew necessary to its own safety;

5. When the port to which it would be possible to take the vessel which has been seized is too far away.

A *procès-verbal* shall be drawn up concerning the destruction of the vessel which has been seized and the grounds therefor; this *procès-verbal* shall be transmitted to the superior military authority and to the nearest court of inquiry, and the latter shall examine, and if necessary complete, the documents relating thereto and transmit them to the prize court.

Institute, 1882, p. 55.

No merchant vessel, or any cargo belonging to an individual, enemy or neutral, no shipwrecked vessel, or vessel which has run aground or been abandoned, or any fishing vessel, may be seized as



prize and condemned except by virtue of a decision of courts of prize and because of acts forbidden by the present regulations.

Institute, 1887, p. 75.

When a prize is taken at sea, it must be brought, with due care, into some convenient port, for adjudication by a competent court; \* \* \* But by the modern usage of nations, neither the twenty-four hours' possession, nor the bringing the prize *infra praesidia*, is sufficient to change the property in the case of a maritime capture. A judicial inquiry must pass upon the case, and the present enlightened practice of commercial nations has subjected all such captures to the scrutiny of judicial tribunals, as the only sure way to furnish due proof that the seizure was lawful. The property is not changed in favor of neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction, belonging to the sovereign of the captor; and the purchaser must be able to show documentary evidence of that fact, to support his title. Until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is in abeyance, or in a state of legal sequestration. It can not be alienated or disposed of, but the possession of it by the government of the captor is a trust for the benefit of those who may be ultimately entitled. This salutary rule, and one so necessary to check irregular conduct and individual outrage, has been long established in the English admiralty, and it is now everywhere recognized as the law and practice of nations.

Kent, vol. 1, pp. 111, 112.

The duty of the lawful cruiser in time of war, on stopping a vessel, is to make such examination as the circumstances permit at the time, and to release the vessel if there is not probable cause for a fuller examination by the prize tribunal. If the evidence disclosed leaves such well-founded suspicion as would influence a mind of reasonable intelligence and fairness, the duty of the cruiser is to send the vessel into a convenient port of his own country, for such an examination as can only be satisfactorily made in port, and by means in the possession of a prize court.

Note 186, Dana's Wheaton.

After such an examination as the commander of a cruiser can make, his duty, as against neutrals, is to decide between two courses: He must either release the vessel absolutely, with her cargo, papers, passengers, and all entire; or he must complete his capture, make her a prize, and send her in for adjudication.

Dana's Wheaton, Note 186.

Necessity will excuse the captor from the duty of sending in his prize. If the prize is unseaworthy for a voyage to the proper port, or there is impending danger of immediate recapture from an enemy's vessel in sight, or if an infectious disease is on board, or other cause of a controlling character, the law of nations authorizes a destruction or abandonment of the prize, but requires all possible preservation of evidence, in the way of papers and persons on board. And, even if nothing of pecuniary value is saved, it is the right and duty

of the captor to proceed for adjudication in such a case, for his own protection and that of his government, and for the satisfaction of neutrals.

Note 186, Dana's *Wheaton*.

It is incumbent on the captor to bring his prize, as speedily as may be consistent with his other duties, within the jurisdiction of a court competent to adjudicate upon it. But, if prevented by imperious circumstances from bringing it in, he may be excused for taking it to a foreign port, or for selling it, provided he afterwards reasonably subjects its proceeds to the jurisdiction of a competent court of prize.

Halleck, p. 729.

It is the first duty of the captor, says Mr. Wildman (ii., 176), to bring in his prize for adjudication, but "if this is impossible, his next duty is to destroy the enemy's property: if it be doubtful whether it be the enemy's property, and impossible to bring it in, no such obligation arises, and the safe and proper course is to dismiss." Of course, if this doctrine, based on English decisions, be true, destruction of neutral ships or property by mistake must be made good by the cruiser's government.

\* \* \* The French, while the Berlin and Milan decrees were in force, burnt a number of neutral American vessels having on board merchandise of British origin. Probably the custom, at least in regard to hostile ships captured, is an ancient one.

\* \* \* \* \*

The whole practice is a barbarous one, and ought to disappear from the history of nations.

Woolsey, pp. 242, 243.

**Accord, but not with the exception.**

He [the captor] must bring in the captured property for adjudication, and must use all reasonable speed in doing so. In cases of improper delay, demurrage is given to the claimant, and costs and expenses are refused to the captor. It follows as of course from this rule,—which itself is a necessary consequence of the fact that property in neutral ships and goods is not transferred by capture,—that a neutral vessel must not be destroyed; \* \* \* If a vessel is not in a condition to reach a port where adjudication can take place, but can safely be taken into a neutral port, it is permissible to carry her thither, and to keep her there if the local authorities consent. In such case the witnesses, with the ship's papers and the necessary affidavits, are sent in charge of an officer to the nearest port of the captor where a prize court exists.

In the course of bringing in, the captor must exercise due care to preserve the captured vessel and goods from loss or damage; and he is liable to penalties for negligence. For loss by fortune of the sea he is of course not liable.

Hall, pp. 762, 763.

Great Britain, which had taken that ground in her correspondence with Russia, submitted at the Hague in 1907 a proposal to declare that "the destruction of a neutral prize by the captor is prohibited.

The captor ought to release every neutral ship which he cannot bring before a prize court." The United States submitted a proposal to the same effect. The Russian counter-proposal was as follows:

Believing that the absolute prohibition to destroy neutral prizes would place powers having no maritime bases except on their home coasts in a position of inferiority, and being of opinion that every international agreement ought to be founded on the principle of reciprocity and equal opportunity, the Imperial Russian delegation submits to the consideration of the fourth committee the following disposition which appears to it to take account of all the interests involved;

The destruction of a neutral prize is prohibited except if its preservation might compromise the security of the capturing ship or the success of its operations. The commander of the capturing ship must use the right of destruction with the greatest reserve, and must take care first to transship the men and so far as possible the cargo, also in every case to preserve all the shipping documents (*papiers de bord*) and other elements necessary for an adjudication on the prize and for fixing the indemnities due to neutrals. \* \* \*

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It will be observed that the Russian argument assumes that the prohibition to destroy neutral ships cannot be claimed as a neutral right, and is therefore a subject of bargain, in which character it was not unfair to connect it with the relative practical situations which it would create for a certain class of powers. Col. Ovtchinikoff, in the discussion in the fourth committee, observed that the position of inferiority referred to in the proposal would be aggravated if the regulation on the rights and duties of neutrals in maritime war, then before the third committee, should make it more difficult for belligerents and their prizes to avail themselves of neutral ports. In the same discussion it was asserted in support of the British proposal that the destruction of a neutral prize is always in contradiction with the principles on the subject of neutrality, which can scarcely be consistently maintained by anyone who does not hold that the same principles condemn the destruction of an enemy ship with neutral cargo on board.

In the end the question of destroying neutral prizes was allowed to drop at the Hague, but was resumed at London with the result embodied in the Declaration of London.

Westlake, vol. 2, pp. 311, 312.

In our account of prize proceedings we have assumed throughout that the vessel has been brought into port and delivered over to the custody of the court. \* \* \*

But the most controversial cases arise when a cruiser destroys her prizes at sea, instead of taking them in for adjudication. \* \* \*

A broad line of distinction must be drawn between the destruction of enemy property and the destruction of neutral property. The former has changed owners as soon as the capture is effected; but the latter does not belong to the captors till a properly constituted

court has decided that their seizure of it was good in International Law. Its owners have, therefore, a right to insist that an adjudication upon their claim shall precede any further dealings with it. If this right of theirs is disregarded, a claim for satisfaction and indemnity may be put in by their government. It is far better for a captor to release a neutral ship or goods as to which he is doubtful, than to risk personal loss and international complications by destroying innocent property. Great Britain took this view, and instructed her naval officers accordingly. The Institute of International Law in its *Règlement International des Prises Maritimes* permitted the destruction of enemy ships in certain circumstances and under certain conditions, but was silent as to neutral vessels. It is true that the regulations of some states spoke in general terms of the destruction of prizes at sea without making it clear that enemy vessels only were intended. It is also true that in a few cases a distinct claim was made of a right to sink or burn neutral ships which could not be sent in for adjudication. The Russo-Japanese War of 1904-1905 afforded an instance of this last pretension on the part of both belligerents. In pursuance of their instructions Russian warships sank several neutral merchantmen instead of bringing them into port for trial before an appropriate tribunal. The most notorious of these cases was that of the *Knight Commander*, a British vessel, for whose destruction the English Government claimed a pecuniary indemnity, which Russia refused to pay. She refused also to submit the matter to the Hague Tribunal for arbitration. In 1907 the general question was discussed at the second Hague Conference, of course without reference to particular cases. But no agreement was reached. Better fortune, however, attended the deliberations of the Naval Conference of 1908-1909. As a result of its labors divergent views were harmonized; and the fourth chapter of the Declaration of London dealt with the subject in a series of rules which we may hope will soon become accepted law throughout the civilized world.

Lawrence, pp. 482-486.

That as a rule captured neutral vessels may not be sunk, burned, or otherwise destroyed has always been universally recognized just as that captured enemy merchantmen may not as a rule be destroyed. But up to the time of the agreement on the Declaration of London it was a moot question whether the destruction of captured neutral vessels was likewise exceptionally allowed instead of bringing them before a Prize Court. British practice did not, as regards the neutral owner of the vessel, hold the captor justified in destroying a vessel, however exceptional the case may have been, and however meritorious the destruction of the vessel may have been from the point of view of the Government of the captor. For this reason, should a captor, for any motive whatever, have destroyed a neutral prize, full indemnities had to be paid to the owner, although, if brought into a port of a Prize Court, condemnation of vessel and cargo would have been pronounced beyond doubt. The rule was, that a neutral prize must be abandoned in case it could not, for any reason whatever, be brought to a port of a Prize Court. But the practice of other States did not recognize this British rule. The question became of great importance in 1905, during the Russo-Japanese War, when Russian cruisers sank the British vessels *Knight Commander*, *Oldhamia*,

*Icona*, *St. Kilda*, and *Hipsang*, the German vessels *Thea*, and *Tetardos*, and the Danish vessel *Princesse Marie*. Russia paid damages to the owners of the vessels *Icona*, *St. Kilda*, *Thea*, *Tetardos*, and *Princesse Marie*, because her Prize Courts declared that the capture of these vessels was not justified, but she refused to pay damages to the owners of the other vessels destroyed, because her Prize Courts considered them to have been justly captured.

The Declaration of London proposes to settle the matter by a compromise. Recognising that neutral prizes may not as a rule be destroyed, and admitting only one exception to the rule, it empowers the captor under certain circumstances and conditions to demand the handing over, or to proceed himself to the destruction, of contraband carried by a neutral prize which he is compelled to abandon.

(Oppenheim, vol. 2, pp. 547-548.)

There is, therefore, no doubt that a neutral prize may no longer be destroyed because the captor cannot spare a prize crew or because a port of a Prize Court is too far distant, or the like. The only justification for destruction of a neutral prize is danger to the captor or his operations at the time of capture. As regards the degree of danger required, it cannot be denied that the wording of article 49 does not provide any clue for a restrictive interpretation. But considering that article 51 speaks of an "exceptional necessity," it is hoped and to be expected that the International Prize Court would give such an interpretation to article 49 as would permit a resort to the sinking of neutral prizes in cases of absolute necessity only.

(Oppenheim, vol. 2, p. 549.)

#### Contra.

In a letter of September 19, 1813, Captain Charles Stewart, of the U. S. S. *Constitution*, was instructed:

"The commerce of the enemy is the most vulnerable point we can attack, and its destruction the main object; and to this end all your efforts should be directed. Therefore, unless your prizes shall be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send them in. The chances of recapture are excessively great, the crew and the safety of the ship under your command would be diminished and endangered, as well as your own fame and the national honor by hazarding a battle after the reduction of your officers and crew by manning prizes. In every point of view, then, it will be proper to destroy what you capture, except valuable and compact articles that may be transshipped.

"This system gives to one ship the force of many, and by granting to prisoners a cartel, as sufficient numbers accumulate, our account on that head will be increased to our credit, and not only facilitate the exchange, but insure better treatment to our unfortunate countrymen who are, or may be, captured by the enemy."

In a subsequent instruction to Captain Stewart, November 29, 1814, the Secretary of the Navy said that, as he had on former occasions "urged the superior advantage of destroying" captures, unless in the vicinity of a friendly port and only in the case of very valuable and fleet-sailing prizes, he need not dwell on that subject, and added: "Daily experience and the grievous complaints of the merchants of Great Britain sufficiently attest the efficacy of the system."

In a letter of December 8, 1813, Master Commandant George Parker, of the *Siren*, was admonished that as the most effectual way of harassing and distressing the enemy was the destruction of his trade and commerce, it "ought to be the ruling principle of action with every commander. A single cruiser, if ever so successful, can," declared the Secretary of the Navy, "man but a few prizes, and every prize is a serious diminution of her force; but a single cruiser, destroying every captured vessel, has the capacity of continuing in full vigor her destructive power so long as her provisions and stores can be replenished, either from friendly ports or from vessels captured. Thus has a single cruiser, upon the destructive plan, the power, perhaps, of twenty, acting upon pecuniary views alone; and thus must the employment of our small forces in some degree compensate for the great inequality compared with that of the enemy."

Similar instruction were given to other commanders on December 22, 1813, January 6, 1814, February 26, 1814, March 3, 1814, and November 30, 1814.

American State Papers, Naval Affairs, 1, 373-376, Moore's Digest, Vol VII, pp. 516. 517.

When a Vessel has been detained she should be sent, with the accustomed precautions, to a Port of Adjudication; and upon her arrival there proceedings should be commenced with a view to her being duly condemned by a Prize Court.

Holland, p. 4.

After Detention, the Commander should as soon as possible send the Vessel and Cargo in for Adjudication.

**Penalty for delay in sending in for adjudication.**

If the Commander is guilty of unnecessary delay in sending the Vessel and Cargo in for Adjudication, he will, in the event of restoration being decreed, be liable for damages.

**What are proper ports of adjudication.**

By a Port of Adjudication is meant a Port to which the Vessel and her Cargo are sent in order that they may lie there in safety pending proceedings for Adjudication.

The Port of Adjudication should, if possible, be a British Port, whether in the United Kingdom or elsewhere in the British Dominions; if not, an Allied Port; but in the latter case it will be necessary, in order that proceedings for Adjudication may be duly instituted, for the Commander to forward the witnesses, together with the Vessel's Papers and necessary Affidavits, in charge of one of the Officers of his Ship to the nearest British Prize Court.

None but a British or an Allied Port can be a proper Port of Adjudication; although in cases of necessity hereafter considered, resort may be had to a Neutral Port.

**Port of adjudication, how to be selected.**

From the many Ports which are proper Ports of Adjudication, the Commander should select the one which, upon a consideration of all the circumstances, shall seem the most convenient. He should have regard in the first place to the exigencies of the Public Service, and

in the second place to the interests of all parties concerned—namely, the owners of the Vessel, the owners of the Cargo, and the Captors. These interests require (amongst other things)—

1. That the Port should be capable of giving safe harbourage to the Vessel.

2. That it should be large enough to admit the Vessel without unloading of her Cargo.

3. That it should offer easy communication with the Prize Court before which the case is to be adjudicated.

4. That it should be as near as possible to the place of Capture.

If the Commander, in selecting a Port of Adjudication, unreasonably disregard the interests of the Owners of the Vessel and Cargo, he will be liable for damages.

Holland, pp. 79–81.

In either of the following cases:

(1) If the Surveying Officers report the Vessel not to be in a condition to be sent into any port for Adjudication; or,

(2) If the Commander is unable to spare a Prize Crew to navigate the Vessel to a Port of Adjudication, the Commander should release the Vessel and Cargo without ransom, unless there is clear proof that she belongs to the Enemy.

Holland, p. 86.

In exceptional cases, when the preservation of a captured vessel appears impossible on account of her bad condition or entire worthlessness, the danger of her recapture by the enemy, or the great distance or blockade of ports, or else on account of danger threatening the ship which has made the capture or the success of her operations, it is permissible for the Commander, on his own responsibility, to burn or sink the captured vessel, after he has taken off all persons on board, and as much of the cargo as possible, and arranged for the safety of the vessel's papers, and any other objects which may be necessary for throwing light on the case at the inquiry to be instituted in accordance with the procedure in prize cases. The Commander will draw up a Report, in accordance with Article 353 of the Naval Regulations (edition of 1899), on the circumstances which have made it necessary for him to destroy the captured vessel.

Russian Regulations, 1895, Article 21.

Captured vessels and cargoes are to be taken by the ship making the capture to Russian ports, or, if there are none near, to ports of an allied Power or to the operating Russian fleet.

Russian Regulations, 1895, Article 22.

Prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port in which a prize court may be sitting.

The Prize should be delivered to the Court as nearly as possible in the condition in which she was at the time of seizure.

United States Instructions to Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780, 782.

If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if

this can not be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court in order that a decree may be duly entered.

Instructions to United States Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898.

Prizes should be sent in for adjudication, unless otherwise directed, to the nearest suitable port, within the territorial jurisdiction of the United States, in which a prize court may take action.

The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of seizure, and to this end her papers should be carefully sealed at the time of seizure and kept in the custody of the prize master.

If there are controlling reasons why vessels that are properly captured may not be sent in for adjudication—such as unseaworthiness, the existence of infectious disease, or the lack of a prize crew—they may be appraised and sold, and if this can not be done, they may be destroyed. The imminent danger of recapture would justify destruction, if there should be no doubt that the vessel was a proper prize. But in all such cases all of the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered.

U. S. Naval War Code, 1900, Articles 46, 47, and 50.

In the following and other similar exceptional cases, the Commander of the Imperial cruiser has the right to burn or sink the captured vessel, after taking off the persons on board, and, if possible the whole or part of the cargo, and also all papers and articles which may be necessary for the elucidation of the case in the Prize Court:—

(1) When it is impossible to preserve the captured vessel on account of her bad condition.

(2) When there is danger of the vessel being recaptured by the enemy.

(3) When the captured vessel is of very little value, and her conveyance would take too much time and entail too great a consumption of coal.

(4) When conveyance appears difficult in consequence of the distance or blockade of the ports to which the vessel should be brought.

(5) When the conveyance may prevent the success of operations of war in which the Imperial cruiser is engaged, or expose her to danger.

The Commander should draw up a report, to be signed by himself and all his officers, explaining the circumstances which have induced him to destroy the captured vessel. He should transmit the report to his superior officer by the first opportunity.

OBSERVATION.—Although Article 21 of the Regulations of 1895, in regard to Naval Prizes, allows the burning or sinking of a captured vessel by the Commander, "on his own responsibility," the latter incurs no responsibility whatever if the captured vessel is really liable to confiscation as a prize, and the exceptional circumstances in which the Imperial ship is placed imperatively demand the destruction of the captured vessel.

Russian Instructions, 1900, sec. 40.



**Circumstances in which capturing ship may be replaced by prize.**

If it appears that a ship which has been captured, and which ought to be destroyed under the preceding Article, is in construction and sea-going qualities better than the Imperial ship, the Commander has the right to replace his own ship by the prize, and to burn or sink his own ship.

Russian Instructions, 1900, sec. 41.

The commander of the warship shall, for the purpose of navigating the ship captured, appoint a prize-master and the necessary petty officers and men, and, putting them on board the ship, at once send her and her cargo to the nearest port in Japan at which there is a prize court, or to a Japanese port in the neighborhood.

Japanese Regulations 1904, Article 79.

In the following cases the commander of the warship may, under unavoidable circumstances, destroy the ship which has been captured or take the steps necessary to meet the emergency. Before, however, destroying the ship, or taking steps necessary to meet the emergency, he must tranship the crew of the ship, and, as far as he is able, her cargo, and take charge of the ship's papers and such articles as are necessary for the Prize Court examination.

1. When, owing to her being in an unseaworthy condition, or because of dangers at sea, the ship cannot be navigated.

2. When there is reason to fear that the ship will be retaken by the enemy.

3. When the ship cannot be navigated without causing a deficiency in the complement of officers and men requisite to the safety of the warship.

In the cases mentioned in the preceding Article, the commander of the warship shall cause the prize-master to draw up a certificate stating in detail the conditions which made it impossible to navigate the ship, with particulars of the steps taken, and send the prize-master with the transhipped crew and cargo, the ship's papers and other documents and articles necessary for the Prize Court examination to the nearest Japanese Prize Court.

Japanese Regulations, 1904, Articles 91 and 92.

The captains of H. M. Ships during a war have the right, in conformity with the following instructions, to visit enemy or neutral merchant vessels, to search them, and to seize them, as well as the enemy and neutral goods found on board and in exceptional cases to destroy them.

During an armistice this right of capture is suspended only when expressly agreed.

German Prize Rules, 1909, Article 1.

The legality of the capture of merchant ships, "Bringing in", of the seizure of goods, and also of the destruction of neutral ships or of goods from their cargoes will be determined later by judgment of a prize court. Prize court proceedings may be instituted also by interested party if the seizure made is released by the captain himself (see 97). The prize court will adjudge as to confiscation, or

release with or without damages; in case of the destruction or release of the prize by the captain himself, as to damages.

German Prize Rules, 1909, Article 1.

The captain will provide for taking the ship, the quickest and safest possible into a German port or one of an allied power.

\* \* \* \* \*

The captain gives the prize officer appropriate sailing orders in writing, and so makes up the prize crew that it is possible for the prize to take the ship in.

German Prize Rules, 1909, Article 111.

113. The captain is authorized to destroy a neutral ship which has been captured because of contraband under 39 or under 77, 78, because of breach of blockade, or under 51 because of unneutral service, only when

a) when it is subject to confiscation (see 41, 51, or 80) and when besides.

b) taking it in would cause a danger to the man-of-war or risk the success of the undertaking in which she is at the time engaged.

This is to be assumed among other things, when

a) the ship cannot be brought in on account of her bad condition or because of shortage of stores, or

b) the ship cannot follow the man-of-war and therefore recapture is probable or

c) the proximity of an enemy force makes the recapture of the ship probable or

d) the man-of-war cannot spare a sufficient crew.

116. Before the destruction, all persons on board, if possible with their goods and chattels, to be placed in safety, and all the ships papers and other articles of evidence which in the opinion of the interested parties are of value for the judgment of the prize court are to be taken over by the Captain.

118. In sinking ships care is to be taken if possible to make no destruction for neutral shipping.

German Prize Rules, 1909, Articles 113, 116, 118.

If it is not possible to take the [captured] ship into the port ordered, he [the prize officer] will seek another into which the prize may be taken (see 111). If this also is not possible, he will proceed to destroy the ship, under the provisions of No. 112 to 118, as soon as the safe salving of the persons, papers, and articles of evidence on board the ship has been accomplished. The requirements of No. 123 are to be observed.

German Prize Rules, 1909, Article 129.

#### Extension of excepted cases.

In case the vessel is devastated or of very little value, or if the port in which shelter is to be sought is very far off or blockaded and the vessel for these reasons runs the risk of being recaptured by the enemy; or, again, when it hinders the movements of the vessel which has captured it; or, finally, when it jeopardizes the success of the naval operations and under every other similar exceptional circumstance, the preservation of the prize having become impossible, the

captain shall be authorized to burn or sink the captured ship, assuming the responsibility and after embarking on board his ship the men and as far as possible the merchandise, as well as all other objects and documents existing on board and likely to enlighten the prize court. Whereupon the captain shall be obliged to prepare a report, stating therein the circumstances which induced the destruction of the captured vessel.

Turkish Regulations, 1912, ch. 1, art. 4.

The captured vessels as well as their cargo shall be headed for an Ottoman port by the captain who has made the capture. In case there is no Ottoman port in the vicinity, he shall head the prize for a port belonging to an allied nation or for a point at which the Ottoman fleet is to pass.

Turkish Regulations, 1912, ch. 1, art. 5.

A captured neutral vessel is not to be destroyed by the captor; but it must be taken into a national or allied port in order to determine there the rights as regards the validity of the capture.

French Naval Instructions, 1912, sec. 156.

Sections 157 and 158 of the French Naval Instructions are substantially identical with Articles 49 and 50, respectively, Declaration of London.

Articles 48, 49 and 50, Declaration of London, are substantially identical with sections 29, 30 and 31, respectively, Austro-Hungarian Manual, 1913.

In a telegram to Mr. Choate, Ambassador to England, on Aug. 6, 1904, Secretary of State Hay said, referring to the case of the *Knight Commander*, sunk by a Russian warship, that the Department was not sufficiently advised of all the circumstances to express an opinion in the case, nor could it say that "in case of imperative necessity," a prize might not be lawfully destroyed by a belligerent captor.

Moore's Digest, vol. VII, p. 520.

"The position, already sufficiently threatening, is aggravated by the assertion on behalf of the Russian Government that the captor of a neutral ship is within his rights if he sinks it, merely for the reason that it is difficult, or impossible, for him to convey it to a national port for adjudication by Prize Court. We understand that this right of destroying a prize is claimed in a number of cases; amongst others, when the conveyance of the prize to a Prize Court is inconvenient because of the distance of the port to which the vessel should be brought, or when her conveyance to such a port would take too much time or entail too great a consumption of coal. It is, we understand, even asserted that such destruction is justifiable when the captor has not at his disposal a sufficient number of men from whom to provide a crew for the captured vessel. It is unnecessary to point out to your Excellency the effects of a consistent application of these principles. They would justify the whole-sale destruction of neutral ships taken by a vessel of war at a distance from her own base upon the ground that such prizes had not on board a sufficient amount of coal to carry them to a remote foreign port—an amount of coal

with which such ships would probably in no circumstances have been supplied. They would similarly justify the destruction of every neutral ship taken by a belligerent vessel which started on her voyage with a crew sufficient for her own requirements only, and therefore unable to furnish prize crews for her captures. The adoption of such measures by the Russian Government could not fail to occasion a complete paralysis of all neutral commerce."

The Marquess of Lansdowne to Sir C. Hardinge, British ambassador to Russia, August 10, 1904.

#### Necessity for condemnation.

*The "Nostra Signora,"* 3 C. Rob., 287.—This was the case of the capture of a British ship by a French vessel and her subsequent sale to a Spaniard. The ship later coming to England, her former owner instituted proceedings for her recovery.

Held that as legal condemnation of the ship could not be shown, she must be restored to the former owners.

*The "Peacock,"* 4 C. Rob., 185.—In this case the captors were held liable in costs and damages, because, instead of bringing the prize as soon as possible to a British port, they took her into a neutral port and kept her there for a "long time."

#### What is a proper port.

*The "Wilhelmsburg,"* 5 C. Rob., 143.—In this case the court awarded claimants demurrage and expenses because the vessel had been taken into the port of Shetland, "where the captor cannot get advice, much less can the claimant learn in what manner to proceed, or where to resort for justice."

See also *The Anna*, 5 C. Rob. 373. wherein the court censured the captors for bringing the prize across the Atlantic to England instead of taking her into a British port in the West Indies.

See also *The Washington*, 6 C. Rob. 275. where the court condemned the captors in damages for having taken the prize to a port in Jersey, which was an "open road," and unsafe for a vessel like the prize.

*The "Anna,"* 5 C. Rob., 373.—In this case the court answered an excuse of the captors for not bringing the prize into an appropriate port, by saying "that they should then have abstained from making any capture, when they could not stay to bring the case to adjudication in the proper courts."

#### Prize court may act without physical presence of prize.

While the prize should be brought into captor's port and there passed upon by a prize court, the physical presence of the prize is not necessary: it may be in the port of a neutral, on the high seas, or at the bottom of the seas.

Scott's Cases, p. 925, note *Hudson v. Guestier*, 4 Cranch, 293; *The Invincible*, 2 Gall., 27.

*Jecker v. Montgomery*, 13 How., 498, 516.—In this case the court said: "As a general rule, it is the duty of the captor to bring it within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned. This is required by the act of Congress in cases of capture by ships of war of

the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which in all civilized countries secures to the captured a trial in a court of competent jurisdiction before he can finally be deprived of his property.

"But there are cases where from existing circumstances the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel, or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country; and may afterwards proceed to adjudication in a court of the United States."

See also *Fay v. Montgomery*, Curtis, 266.

*The "Polka," Spinks Prize Cases, 57.*—In this case the court condemned prizes which had been taken into a neutral port and left there, because of their unseaworthiness, and with the consent of the neutral government.

The court said: "I wish it, moreover to be expressly understood that this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port. The rule is that the prize shall be brought into a port belonging to the captor's country."

*The "Leucade," Spinks Prize Cases, 217.*—The court said: "\* \* \* when a vessel under neutral colors is detained, it has the right to be brought to adjudication; according to the regular course of proceeding in the Prize Court, and it is the very first duty of the captor to bring it in, if it be practicable."

"From the performance of the duty the captor can be exonerated only by showing that he was a *bona fide* possessor and that it was impossible for him to discharge it. No excuse for him as to inconvenience or difficulty can be admitted as between captor and claimants. If the ship be lost, that fact alone is no answer; a captor must show a valid cause for the detention as well as the loss. If the ship be destroyed for reasons of policy alone, as to maintain a blockade or otherwise, the claimant is entitled to costs and damages. The general rule, therefore is that if a ship under neutral colors be not brought to a competent Court for adjudication, the claimants are as against the captor entitled to costs and damages. Indeed if the captor doubt his power to bring in a vessel to adjudication, it is his duty under ordinary circumstances to release her."

*The "Knight Commander," Russian and Japanese Prize Cases, vol. 1, p. 54.*—This was the case of a vessel captured on a voyage from New York to Japan, carrying a cargo of material for railways, bridges, and tramways, and other goods. No manifest or bills of lading were produced and there was evidence on board that part of the cargo was to be carried to Chemulpo, and therefore destined for the use of the Japanese army, and that the master was aware that the ship was liable to capture. She was destroyed on the ground that there was not sufficient coal to take her to a Russian port.

Held by the Vladivostock Court and by the Supreme Prize Court that more than half the cargo was contraband and that the ship was

consequently liable to condemnation and that the question of the regularity of the sinking of a captured ship was a matter only for the superior officer who gave the order for the sinking and not for the Prize Court.

**When destruction justified.**

*The "Oldhamia," Russian and Japanese Prize Cases, vol. 1, p. 145.*—This vessel, captured while carrying to Japan a cargo of kerosene, held to be contraband, struck on a rock, during a fog, while being taken to a port of the captor. It was found impossible to float the vessel with the resources at hand and taking into consideration the distance to any Russian port from which assistance could be obtained, and the nearness to Japan, which rendered it likely that the Japanese would discover the prize, the Russian officer in charge, after waiting two days, landed the crew and provisions and destroyed the vessel.

Held by the Russian Supreme Court that the destruction was justifiable.

See also *The Ikhona*, id. 226, in which the Supreme Prize Court apparently justified the destruction of the vessel, because "there was no Russian or neutral port" to which she could be taken. In this case, the Court rejected, as contrary to Russian and International Law, the contention of the claimants "that the destruction of a vessel of neutral nationality is not generally permissible."

An insurer's responsibility continues until the prize court has adjudicated that a vessel is lawful prize.

Decision of December 18, 1907, in re *Nederlandsche Lloyd and Company* (defendant) against C. A. (plaintiff), 67 Imperial Court Decisions, (German) 251.

The court said: "Seizure merely forms the basis for the examination by the prize court which can end only with the release of the ship or its adjudication as a lawful prize. The latter means total loss; seizure is only a provisional act and maintains the responsibility of the insurer for maritime danger."

#### CONSEQUENCES OF FAILURE TO JUSTIFY DESTRUCTION OF NEUTRAL VESSEL.

**A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested and no examination shall be made of the question whether the capture was valid or not.**

**If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.**

**If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.—*Declaration of London, Articles 51, 52 and 53.***

#### Comment on Article 51.

This claim gives a guaranty against the arbitrary destruction of prizes by throwing a real responsibility upon the captor who has carried out the destruction. The result is that before any decision is given respecting the validity of the prize, the captor must prove that the situation he was in was really one which fell under the head of the exceptional cases contemplated. This must be proved in proceedings to which the neutral is a party, and if the latter is not satisfied with the decision of the national prize court he may take his case to the international court. Proof to the above effect is, therefore, a condition precedent which the captor must fulfill. If he fails to do this, he must compensate the parties interested in the vessel and the cargo, and the question whether the capture was valid or not will not be gone into. In this way a real sanction is provided in respect of the obligation not to destroy a prize except in particular cases, the sanction taking the form of a fine inflicted on the captor. If, on the other hand, this proof is given, the prize procedure follows the usual course; if the prize is declared valid, no compensation is due; if it is declared void, the parties interested have a right to be compensated. Resort to the international court can only be made after the decision of the prize court has been given on the whole matter, and not immediately after the preliminary question has been decided.

#### Comment on Articles 52 and 53.

Supposing a vessel which has been destroyed carried neutral goods not liable to condemnation: the owner of such goods has, in every case, a right to compensation; that is, without there being occasion

to distinguish between cases where the destruction was or was not justified. This is equitable and a further guaranty against arbitrary destruction.

Report of committee which drafted Declaration of London.

According to English decisions, the destruction of neutral vessels taken as prizes, can be justified only by the most cogent reasons of public service; and if such a vessel is burnt wantonly, or under a plea of necessity, the captor or his government is responsible.

Woolsey, p. 242.

114. Before the captain decides to destroy a ship he will consider whether the injury thereby done to the enemy will outweigh the damages that will have to be paid for the simultaneous destruction of the non-confiscable part of the cargo (see 18, 42, 56 and 80).

115. If a neutral ship be destroyed when, according to the decision of the prize court, the special circumstances named under 113 b, did not exist, the owners of ship and cargo—whether these be confiscable or not—have a claim for damages. If the circumstances in question did exist, but the destroyed ship or neutral goods be shown not confiscable, the respective owners have also a claim for damages.

116. Before the destruction, all persons on board, if possible with their goods and chattels, to be placed in safety, and all the ship's papers and other articles of evidence which in the opinion of the interested parties are of value for the judgment of the prize court are to be taken over by the Captain.

117. If circumstances permit the salvage of parts of the cargo or equipment, their choice is to be determined first by the requirements of the man-of-war; second, with regard to the damages to be paid (see 114, 115).

German Prize Rules, 1909, Articles 114–117.

In every case of destruction of ships or goods, there are to be sent to the Chief of Admiral Staff as soon and as safely as possible, for transmission to the prize court having jurisdiction—

(a) the papers and other articles or evidence,

(b) a statement of the destruction, the reasons therefor, and all attendant circumstances.

The Chief of Admiral Staff is besides to be informed as soon as possible of the destruction of a neutral ship, by a brief telegraphic report direct of the principal data.

German Prize Rules, 1909, Article 123.

I remind you that a captor who has destroyed a neutral vessel must, as a condition precedent to any decision upon the validity of the capture, establish in fact that he only acted in the face of exceptional necessity in the sense of paragraph 157.

French Naval Instructions, 1912, sec. 159.

Articles 51, 52 and 53, Declaration of London, are substantially identical with sections 32, 33 and 34 respectively, Austro-Hungarian Manual, 1913.

*The "Acteon," 2 Dod., 48.*—In this case the British captor claimed that he could not spare a prize crew and so destroyed the vessel.



Held that he was responsible in damages to the owner, even though he acted from a sense of public duty, and that he must look to his own government for indemnification.

*The "Felicity," 2 Dod., 380.*—In this case the court stated the "general rule of justice" as prescribing "that, if a neutral ship, or protected ship, is destroyed by a captor, either wantonly, or under an alleged necessity, in which she herself was not directly involved, the captor or his government is answerable for the spoliation."

**What constitute good reasons for capture.**

*The "Allanton," Russian and Japanese Prize Cases, vol. 1, p. 1.*—The Russian Supreme Court held that the following constituted good reasons for the capture of the ship, although ship and cargo were found not liable to condemnation:

1. That the vessel did not stop at the first summons of the Russian Cruiser, but only after two blank shots had been fired.
2. That the official log-book was not kept in proper form.
3. That the cargo was shipped at an enemy port, and that a Japanese was on board who could not establish his identity.
4. That the steamer adopted a course seldom chosen by ship captains, and passed close to the enemy ports and enemy fleet.
5. That on a previous occasion the steamer delivered contraband at an enemy port.

*The "Knight Commander," Russian and Japanese Prize Cases, vol. 2, p. 54.*—In this case, in which the captured vessel was destroyed, the Prize Court awarded compensation to the owners of the non-contraband cargo.

*The "Thea," Russian and Japanese Prize Cases, vol. 1, p. 96.*—In this case the captured vessel was destroyed and the capture was subsequently held to be invalid.

Compensation was paid for vessel and innocent cargo.

See also *The Tetartos*, Russian and Japanese Prize Cases, vol. 1, p. 166; *The St. Kilda*, id., p. 188; *The Ikhona*, id., p. 226; and the *Prinsesse Marie*, id., p. 276.

HANDING OVER, OR DESTRUCTION OF CONDEMNABLE GOODS ON BOARD VESSEL NOT  
HERSELF CONDEMNABLE.

The captor has the right to demand the handing over, or to proceed himself to the destruction of, any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the logbook of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage.

The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.—*Declaration of London, Article 54.*

A cruiser encounters a neutral merchant vessel carrying contraband in a proportion less than that specified in article 40. The captain may put a prize crew on board the vessel and take her into a port for adjudication. He may, in conformity with the provisions of article 44, agree to the handing over of the contraband if offered by the vessel stopped. But what is to happen if neither of these solutions is reached? The vessel stopped does not offer to hand over the contraband, and the cruiser is not in a position to take the vessel into a national port. Is the cruiser obliged to let the neutral vessel go with the contraband on board? To require this seemed going too far, at least in certain exceptional circumstances. These circumstances are in fact the same as would have justified the destruction of the vessel, had she been liable to condemnation. In such a case, the cruiser may demand the handing over, or proceed to the destruction, of the goods liable to condemnation. The reasons for which the right to destroy the vessel has been recognized may justify the destruction of the contraband goods, the more so as the considerations of humanity which can be adduced against the destruction of a vessel do not in this case apply. Against arbitrary demands by the cruiser there are the same guaranties as those which made it possible to recognize the right to destroy the vessel. The captor must, as a preliminary, prove that he was really faced by the exceptional circumstances specified; failing this, he is condemned to pay the value of the goods handed over or destroyed, and the question whether they were contraband or not will not be gone into.

The article prescribes certain formalities which are necessary to establish the facts of the case and to enable the prize court to adjudicate.

Of course, when once the goods have been handed over or destroyed and the formalities carried out, the vessel which has been stopped must be left free to continue her voyage.

Report of committee which drafted Declaration of London.

The captor has the right to demand the handing over, or to proceed himself to the destruction of, any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under the preceding article justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the log-book of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage.

\* \* \* the captor shall be required to compensate the parties interested, unless he is able to justify the exceptional necessity of the destruction, or unless, the destruction having been justified, the capture is subsequently declared void.

Institute, 1913, pp. 198-200.

If the vessel is not subject to confiscation or if there is doubt, you have the right to require the giving up of, or to proceed to destroy, goods liable to condemnation found on board the said vessel, provided that the circumstances are such as justify the destruction of a vessel liable to condemnation. You will then enter the articles delivered or destroyed in the log-book of the vessel stopped, and you will procure from the master duly certified copies of all relevant papers. When the giving up or destruction has been completed, and the formalities have been fulfilled, the master must be allowed to continue his voyage. Omission of these formalities involves the responsibility of the captor.

French Naval Instructions, 1912, sec. 160.

Article 54, Declaration of London, is substantially identical with section 35, Austro-Hungarian Manual, 1913.

*The "Cilurnum," Russian and Japanese Prize Cases, vol. 1, p. 186.*—In this case a Russian commander destroyed part of a cargo on board a British steamer, on the grounds that it was contraband and the proximity of Japanese war-ships prevented the unloading of the cargo.

The Libau Prize Court held that the action of the officer was correct.

TRANSFER OF ENEMY VESSEL TO NEUTRAL FLAG, BEFORE OUTBREAK OF HOSTILITIES.

The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted. Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities and if the bill of sale is not on board, the capture of the vessel gives no right to damages.—*Declaration of London, Article 55.*

An enemy merchant vessel is liable to capture, whereas a neutral merchant vessel is immune. It can therefore be readily understood that a belligerent cruiser encountering a merchant vessel which lays claim to neutral nationality has to inquire whether such nationality has been acquired legitimately or merely in order to shield the vessel from the risks to which she would have been exposed had she retained her former nationality. This question naturally arises when the transfer has taken place a comparatively short time before the moment at which the ship is searched, whether the actual date be before or after the outbreak of hostilities. The answer will be different according as the question is looked at from the point of view of commercial or belligerent interests. Fortunately, rules have been agreed upon which conciliate both these interests as far as possible, and which at the same time tell belligerent and neutral commerce what their position is.

The general rule laid down in the first paragraph is that the transfer of an enemy vessel to a neutral flag is valid, assuming, of course, that the ordinary requirements of the law have been fulfilled. It is upon the captor, if he wishes to have the transfer annulled, that the onus lies of proving that its object was to evade the consequences entailed by the war in prospect. There is one case which is treated as suspicious, that, namely, in which the bill of sale is not on board

when the ship has changed her nationality less than 60 days before the outbreak of hostilities. The presumption of validity which has been set up by the first paragraph in favor of the vessel is then replaced by a presumption in favor of the captor. It is presumed that the transfer is void, but the presumption may be rebutted. With a view to such rebuttal, proof may be given that the transfer was not effected in order to evade the consequences of the war; it is unnecessary to add that the ordinary requirements of the law must have been fulfilled.

It was thought desirable to give to commerce a guaranty that the right of treating a transfer as void on the ground that it was effected in order to evade the consequences of war should not extend too far, and should not cover too long a period. Consequently, if the transfer has been effected more than 30 days before the outbreak of hostilities, it can not be impeached on that ground alone, and it is regarded as unquestionably valid if it has been made under conditions which show that it is genuine and final. These conditions are as follows: The transfer must be unconditional, complete, and in conformity with the laws of the countries concerned, and its effect must be such that both the control of, and the profits earned by, the vessel pass into other hands. When once these conditions are proved to exist, the captor is not allowed to set up the contention that the vendor foresaw the war in which his country was about to be involved, and wished by the sale to shield himself from the risks to which a state of war would have exposed him in respect of the vessels he was transferring. Even in this case, however, when a vessel is encountered by a cruiser and her bill of sale is not on board, she may be captured if a change of nationality has taken place less than 60 days before the outbreak of hostilities; that circumstance has made her suspect. But if before the prize court the proof required by the second paragraph is adduced, she must be released, though she can not claim compensation, inasmuch as there was good reason for capturing her.

Report of committee which drafted Declaration of London.

The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel as such is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost its belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void; this presumption may be rebutted.

Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

Institute, 1913, p. 187.

**Transfer in transitu.**

\* \* \* ships cannot easily transfer their nationality on a voyage, the act of so doing being presumptive evidence of a fraudulent intention to screen them from the liabilities of their former nationality.

Woolsey, p. 297.

With regard to property at sea, it often happens that the enemy owners of merchantmen entitled to fly the enemy flag endeavor at the outbreak of the war, or even in anticipation of it, to transfer their vessels to neutrals in order that the neutral flag may protect them from capture, and sometimes these transfers are merely colorable. Belligerents are therefore obliged to take precautions against evasion of their rights. The rules laid down by maritime powers in order to effect this purpose proceeded on similar lines, but did not agree in every particular. The subject was, therefore, discussed at the Naval Conference of 1908-1909 with a view to bringing about uniformity; and a unanimous agreement was reached. Its terms are embodied in Articles 55 and 56 of the Declaration of London.

Lawrence, p. 380.

**Conflicting practice.**

The question of the transfer of enemy vessels to subjects of neutral States, either shortly before or during the war, must be regarded as forming part of the larger question of enemy character, for the point to be decided is whether such transfer divests these vessels of their enemy character. It is obvious that, if this point is answered in the affirmative, the owners of enemy vessels can evade the danger of having their property seized and confiscated by selling their vessels to subjects of neutral States. Before the Declaration of London, which is, however, not yet ratified, the maritime Powers had not agreed upon common rules concerning this subject. According to French practice no transfer of enemy vessels to neutrals could be recognised, and a vessel thus transferred retained enemy character; but this concerned only transfer after the outbreak of war, any legitimate transfer anterior to the outbreak of war did give neutral character to a vessel. According to British and American practice, on the other hand, neutral vessels could well be transferred to a neutral flag before or after the outbreak of war and lose thereby their enemy character, provided that the transfer took place *bonâ fide*, was not effected either in a blockaded port or while the vessel was *in transitu*, the vendor did not retain an interest in the vessel or did not stipulate a right to recover or repurchase the vessel after the conclusion of the war, and the transfer was not made *in transitu* in contemplation of war.

Oppenheim, vol. 2. pp. 117, 118.

The Commander will be justified in treating as an Enemy Vessel:—

\* \* \* \* \*

5. Any Vessel apparently owned by a British, Allied, or Neutral subject, if such person has acquired the ownership by a Transfer from an Enemy made at any time \* \* \*, or previous to the war

but in contemplation of its breaking out, unless there is satisfactory proof that the Transfer was *bonâ fide* and complete. In the event of such a Transfer being alleged, the Commander should call for the Bill of Sale, and also for any Papers or Correspondence relating to the same. If the Bill of Sale is not forthcoming, and its absence is unaccounted for, he should detain the Vessel. If the Bill of Sale is produced, its contents should be carefully examined, especially in the following particulars:

- a. The Name and Residence of the Vendor.
- b. The Name and Residence of the Purchaser.
- c. The Place and Date of the Purchase.
- d. The Consideration-money and the Receipt.
- e. The Terms of the Sale.
- f. The Service of the Vessel and the Name of the Master, both before and after the Transfer.

The Name and Residence of the Vendor are material to show whether or not he was an Enemy.

The Name and Residence of the Purchaser are material to show whether or not he was a person resident in British, Allied, or Neutral Territory.

The Date and Place of the Purchase are material to show whether or not the Transfer was made in contemplation or in consequence of the war.

The Consideration-money is material, in case the Vessel is alleged to have been transferred by Sale, to show whether or not the transaction was *bonâ fide*. For if the transaction was professedly a Sale, then the fact that the consideration was nominal or wholly inadequate would be a just cause for suspicion. But a Transfer by way of gift or bequest will, if *bonâ fide* and complete, be as valid as a Transfer by way of Sale.

The Receipt for the purchase-money should be called for in case the Vessel is alleged to have been transferred by Sale; but if there is proof that the Sale was *bonâ fide* and in other respects complete, the Transfer will be good, although no Receipt is forthcoming, and even although the Purchase-money has not in fact been paid. For the Prize Court does not consider any lien which an Enemy vendor may have upon a Vessel or Cargo or Freight for unpaid purchase-money to be a subsisting Enemy's interest rendering the Vessel liable to confiscation. However, the fact that the Purchase-money, instead of having been paid in Cash, has only been carried to an account, will raise the presumption of the Transfer being merely colorable, and such presumption can be rebutted only by clear proof to the contrary.

The terms of the Sale are material to show whether the transfer was complete. The Transfer would not be complete if the Sale was not absolute; as, if it contained a Power of Revocation, or a condition for a return of the Vessel at the close of the war, or a reservation of the profits of the Vessel, or of any control over her to be left in the hands of the former Owner.

The Service of the Vessel, and the name of the Master both before and after the Transfer, are material to show whether or not the Transfer be a genuine one; for if the Service has continued unaltered by the Transfer, the Commander will be justified in holding

the Transfer to be colorable only. The fact that the same Master is retained in command after the Transfer raises a suspicion, but, standing alone, will not be conclusive that the Transfer was not *bonâ fide*.

If the Transfer is *bonâ fide* and complete as between the parties, the fact that it was effected in fraud of the Revenue or the law of the Mercantile Marine of any Foreign Country will be immaterial.

If the Purchase was made through an Agent, the Letters of Procuration should be called for.

Holland, p. 7.

#### British position.

The commander will be justified in treating as a British vessel—

\* \* \* \* \*

4. Any vessel apparently owned by a person having a neutral commercial domicile, if such person has acquired the ownership by a transfer from a British subject made after the vessel had started upon the voyage during which she is met with, and has not yet actually taken possession of her.

5. Any vessel apparently owned by a person having a neutral commercial domicile, if such person has acquired the ownership by a transfer from a British subject made at any time during the war, or previous to the war but in contemplation of its breaking out, unless there is satisfactory proof that the transfer was *bonâ fide* and complete.

Holland, p. 13.

#### Contra as to presumption.

By enemy ships are meant those enumerated below:—

\* \* \* \* \*

4. Ships the ownership of which has been transferred by the hostile state, or by individuals of that nation, \* \* \* before the war in anticipation of hostilities breaking out \* \* \* to a person domiciled in Japan or in a neutral country, there being no proof that the transfer of ownership was *bonâ fide* and complete.

When the ownership of a ship is transferred while she is on her voyage, and actual delivery has not yet taken place, the transfer of ownership shall be regarded as not *bonâ fide* and complete.

Japanese Regulations, 1904. Article 6.

When the transfer to a neutral flag took place earlier than 30 days before the outbreak of hostilities, the ship is to be treated as hostile only when—

(a) The transfer took place later than 60 days before the outbreak of hostilities, provided further,—

(b) the transfer is only conditional or incomplete or not in conformity with the legal requirements of the participant countries, or the result is that the control of the ship or the earnings from her and when employment remain in the same hands as before; and when besides

(c) grounds exist for the belief that it can be proved before the prize court that the transfer was effected in order to relieve the ship of the consequences of her character as an enemy ship.



This especially may be taken for granted when the transfer document is not found on board; the bringing in of the ship in such a case never gives rise to a claim for damages (See 8).

German Prize Rules, 1909, Article 14.

When the transfer to a neutral flag has taken place within 30 days before the outbreak of war, the ship is to be treated as hostile; provided:

(a) Either the legal requirements necessary to the validity of the transfer have not been fulfilled, so that an actually valid transfer to the neutral flag has not taken place.

(b) Or there is good reason to believe that it can be proved before the prize court that the transfer took place to relieve the ship of the consequences of her character as an enemy ship. (See 12 (a)). So especially when the ship after the transfer is further employed on the same route as before.

(c) Or the transfer document is not on board, unless sufficient evidence is shown that the transfer would also have taken place without war (See 12 (a)); the seizure of the ship in such a case gives rise to no claim for damages (See 8).

German Prize Rules, 1909, Article 13.

When the captain is not in a position to determine to which flag a vessel which has been transferred to a neutral flag formerly belonged he is authorized to assume that she belonged to the enemy flag.

German Prize Rules, 1909, Article 15.

#### **Treatment of crew of captured vessel.**

If a ship be captured under 10 to 16a, as an enemy ship [including cases of illegal transfer] \* \* \*, the Master, officers and members of the crew—as far as they are of the enemy's nationality,—will not be made prisoners of war, if they bind themselves on the strength of a formal written promise to engage in no service, during the period of the war, that may have any connection with the hostile undertakings of the enemy.

German Prize Rules, 1909, Article 100.

Sections 109 and 110, French Naval Instructions, 1912, are identical with Article 55, Declaration of London.

Article 55, Declaration of London, is substantially identical with section 10, Austro-Hungarian Manual, 1913.

*The "Juffrouw Elbrecht," 1 C. Rob. 126.*—In this case the neutral claimant alleged that he had bought the vessel (from an enemy subject) six months before the war broke out.

However, the court said that at the time of the alleged purchase, "the prospect of a war was certain," and condemned the vessel because she continued in enemy trade, all the affairs of the vessel appeared to have remained in enemy hands and the master resided in enemy territory.

#### **Property in transit.**

*The "Jan Frederick," 5 C. Rob., 133.*—In this case the court said that a transfer of property *in transitu*, in time of war, "is pro-

hibited as a vicious contract; being a fraud on belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce, of evading these rights beyond possibility of detection."

The court extended the above rule to cover the case of property sold before the war, *but in avowed contemplation thereof*, and on this ground condemned the property which formed the subject matter of the litigation.

*The "Christine," 2 Spinks, pp. 24-27.*—This was a case of a Russian vessel, alleged to have been transferred, shortly before the Crimean war, to a citizen of Lubeck, who admitted that he had not paid any part of the purchase price, nor given any security therefor except his own personal engagement. Moreover, there was no bill of sale on board.

On these grounds, the claimed sale being to a person, who was master of the vessel at the time of the sale and who afterwards continued to be master, the vessel was condemned.

*The "Soglasie," 2 Spinks, 101-107.*—This was the case of a Russian ship, the master of which, holding a power of attorney from the owner, and war being imminent between Great Britain and Russia, sold her to an alleged Danish subject residing and trading in Messina, Italy. There was no proof of the payment of the claimed purchase price. The vessel then sailed to a Russian port, took on a cargo of wheat and went to Copenhagen *in transitu* for Leith, Scotland. At Copenhagen, by virtue of a bill of sale from the alleged Danish purchaser, agents sold her to the master, who, a few days before had assumed to change his nationality from Russian to Danish.

Held, that in view of the lack of proof of the *bona fides* of the successive transfers of the vessel and suspicious circumstances connected therewith, the vessel should be condemned.

*The "Otto and Olaf," Spinks Prize Cases, 257.*—In this case the court adverted to its judgment in the case of *The Soglasie*, in which the opinion had been expressed that after a purchase by a neutral of an enemy's ship, it would be requisite to produce the "correspondence which preceded, the correspondence which attended, and the correspondence which succeeded the transfer," and added that in the case of vessels which had made many voyages after the transfer, the production of so much correspondence would not be required.

The court said: "Where a vessel has been purchased by a neutral, and continued in a lawful trade for a considerable length of time, the presumption arises in favor of the neutral which would not exist provided it had been the first voyage."

*The "Benedict," Spinks Prize Cases, 314.*—In this case the court held that the voluntary transfer, while hostilities were pending, of a ship by an enemy father to a son, who is a neutral, as an advance of a portion of his inheritance, is valid, if made in good faith.

The court said that even if the claimant were not justly to be considered a Dane at the time of the transfer, he had certainly acquired that title since, and "I am not aware that a person whose character was hostile may not change his domicile between the period of the transfer and the time of the claim."

*The "Ariel," 11 Moore, 119.*—This was the case of a Russian vessel sold just before the Crimean war to a Dane. Two-thirds of the pur-

chase price was paid, and the rest was to be paid out of the earnings of the vessel. It was claimed that the ship should be condemned because the enemy still retained an interest in her.

Held that as this was clearly an outright sale made in good faith, the captor had no claim on the vessel on account of any liens that might exist on her.

It was said that the mere fact that all the purchase money was not paid was immaterial, because sale and payment are two distinct things.

*The "Baltica."* 11 Moore, 142-150.—This was the case of a Russian vessel which was sold by a Russian subject to a neutral, when war existed between Russia and Great Britain. The sale appeared to have been bona fide and absolute, but was made when the vessel was in the course of a voyage from Libau, an enemy's port, to Copenhagen, a neutral port, where she arrived and was taken possession of by the purchaser. Later she was seized in a British port, by the customs authorities.

Held, that the sale, though *in transitu*, was valid, as the transitus had ceased when the vessel had come into possession of the purchaser. The court said: "The general rule is open to no doubt. A neutral while a war is imminent \* \* \* is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port."

#### TRANSFER OF ENEMY VESSEL TO NEUTRAL FLAG, AFTER OUTBREAK OF HOSTILITIES.

The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. There, however, is an absolute presumption that a transfer is void:

- (1) If the transfer has been made during a voyage or in a blockaded port.
- (2) If a right to repurchase or recover the vessel is reserved to the vendor.
- (3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled.—*Declaration of London, Article 56.*

The rule respecting transfers made after the outbreak of hostilities is more simple. Such a transfer is only valid if it is proved that its object was not to evade the consequences to which an enemy vessel, as such, is exposed. The rule accepted in respect of transfers made before the outbreak of hostilities is inverted. In that case there is a presumption that the transfer is valid; in the present, that it is void—provided always, that proof to the contrary may be given. For instance, it might be proved that the transfer had taken place by inheritance.

Article 56 recites cases in which the presumption that the transfer is void is absolute, for reasons which can be readily understood. In the first case the connection between the transfer and the war risk run by the vessel is evident. In the second, the transferee is a mere man of straw, who is to be treated as owner during a dangerous period, after which the vendor will recover possession of his vessel. Lastly, the third case might strictly be regarded as already provided for, since a vessel which lays claim to neutral nationality must naturally prove that she has a right to it.

At one time provision was made in this article for the case of a vessel which was retained, after the transfer, in the trade in which she had previously been engaged. Such a circumstance is in the highest degree suspicious; the transfer has a fictitious appearance, inasmuch as nothing has changed in regard to the vessel's trade. This would apply, for instance, if a vessel were running on the same line before and after the transfer. It was, however, objected that to set up an absolute presumption would sometimes be too severe, and that certain kinds of vessels, as, for example, tank ships, could, on account of their build, engage only in a certain definite trade. To meet this objection the word "route" was then added, so that it would have been necessary that the vessel should be engaged in the

same trade and on the same route; it was thought that in this way the above contention would have been satisfactorily met. However, the suppression of this case from the list being insisted on, it was agreed to eliminate it. Consequently, a transfer of this character now falls within the general rule; it is certainly presumed to be void, but the presumption may be rebutted.

Report of committee which drafted Declaration of London.

The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

There is, however, an absolute presumption that a transfer is void: 1. if the transfer has been made during a voyage or in a blockaded port; 2. if a right to repurchase or recover the vessel is reserved to the vendor; 3. if the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled.

Institute, 1913, p. 187.

#### As to property in transitu.

\* \* \* it may be here observed, that property which has a hostile character at the commencement of the voyage cannot change that character by assignment, while it is *in transitu*, so as to protect it from capture. This would lead to fraudulent contrivances to protect the property from capture, by colorable assignments to neutrals. But if a shipment be made in peace, and not in expectation of war, and the contract lays the risk of the shipment on the neutral consignor, the legal property will remain to the end of the voyage in the consignor. During peace, a transfer *in transitu* may be made; but when war is existing or impending, the belligerent rule applies, and the ownership of the property is deemed to continue as it was at the time of the shipment until actual delivery. This illegality of transfer, during or in contemplation of war, is for the sake of the belligerent right, and to prevent secret transfers from the enemy to neutrals, in fraud of that right, and upon conditions and reservations which it might be impossible to detect. So property shipped from a neutral to the enemy's country, under a contract to become the property of the enemy on arrival, may be taken *in transitu* as enemy's property; for capture is considered as delivery. The Captor, by the rights of war, stands in the place of the enemy. The prize courts will not allow a neutral and belligerent, by a special agreement, to change the ordinary rule of peace, by which goods ordered and delivered to the master are considered as delivered to the consignee. All such agreements, though valid in time of peace, are in time of war, or in peace, if made in contemplation of war, and with intent to protect from capture, held to be constructively fraudulent; and if they could operate, they would go to cover all belligerent property, while passing between a belligerent and a neutral country, since the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in the one or the other of those relations. These principles of the English admiralty have been explicitly recognised and acted upon by the

prize courts in this country. The great principles of national law were held to require, that, in war, enemy's property should not change its hostile character, *in transitu*; and that no secret liens, no future elections, no private contracts looking to future events, should be able to cover private property while sailing on the ocean. Captors disregard all equitable liens on enemy's property, and lay their hands on the gross tangible property, and rely on the simple title in the name and possession of the enemy. If they were to open the door to equitable claims, there would be no end to discussion and imposition, and the simplicity and celerity of proceedings in prize courts would be lost. All reservation of risk to the neutral consignors, in order to protect belligerent consignees, are held to be fraudulent; and these numerous and strict rules of the maritime jurisprudence of the prize courts are intended to uphold the rights of lawful maritime capture, and to prevent frauds, and to preserve candor and good faith in the intercourse between belligerents and neutrals. The modern cases contain numerous and striking instances of the acuteness of the captors in tracking out deceit, and of the dexterity of the claimants in eluding investigation.

Kent, vol. 1, pp. 95-97.

The transfer, in time of war, of the vessel of an enemy to a neutral, is a transaction, from its very nature, liable to strong suspicion, and consequently is examined with a jealous and sharp vigilance, and subjected to rules of a peculiar strictness in the prize court of the opposite belligerent. Nevertheless, neutrals have a right to make such purchases of merchant vessels, when they act with good faith, and, consequently, the belligerent powers are not justified, by the law of nations, in attempting to prohibit such transfers by a sweeping interdiction, as was done in former years by both the French and English governments. Ordinances of this character form no part of the law of nations, and, consequently, are not binding upon the prize courts, even of the country by which they are issued. Nevertheless, where the sale is claimed to have been made by an enemy to a neutral, in time of war, it is not unreasonable that its motives, nature and terms should be an object of the most searching inquiry. The temptation to fraud, in such cases, is so great that the entire transaction should be most strictly examined, otherwise the opposing belligerent might be deprived of his just rights of capture. Hence courts of admiralty have established very severe rules respecting such transfers.

Halleck, p. 483, 484.

#### Transfer in transitu.

\* \* \* ships cannot easily transfer their nationality on a voyage, the act of so doing being presumptive evidence of a fraudulent intention to screen them from the liabilities of their former nationality.

Woolsey, p. 297.

The right which a neutral has to carry on innocuous trade with a belligerent of course involves the general right to export from a belligerent state merchandise which has become his by *bonâ fide*

purchase. Vessels, according to the practice of France, and apparently of some other states, are however excepted on the ground of the difficulty of preventing fraud. Their sale is forbidden, and they are declared good prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of a war. In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinised, and a transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war.

Hall, p. 525, 526.

With respect to vessels and merchandise, belonging to an enemy, in transit upon the ocean, the French doctrine gave no scope for special usage until the freedom of neutral goods on board belligerent vessels was accepted by the Declaration of Paris. A valid sale of a vessel being always impossible during war, enemy goods on board an enemy vessel necessarily remained liable to capture; and enemy goods in course of transport by a neutral being protected by the flag, the effect of sale did not need to be considered. By English and American custom all sales during war of property in transitu are bad, unless the transferee has actually taken possession, the probability that they are fraudulently intended being thought to be so high as to amount to a practical certainty; \* \* \*

Hall, p. 526.

Further, a ship may have been transferred by enemies to friends with all the external completeness necessary by the laws of the neutral country for the grant of its flag, but the vendors may have retained an undisclosed interest, the apparent transaction being only a blind to avoid capture. In that case it is thought to be no want of respect to the flag she bears that it shall not protect her. Belligerents, conceiving themselves to have a right to all enemy property at sea, call the transaction a fraud on their rights, and the honour of the neutral state is not thought to be engaged in the protection of fraud. To cut short all tedious and often baffling investigations into such frauds, the French practice, dating as far back as the Réglement of 1694 and confirmed by that of 1778, ignores all sales of ships by enemies not made by authentic acts previous to the declaration of war or the commencement of hostilities. The English practice lays down no rigid rule except one which it applies to cargoes as well as to ships, namely that "in case of war, either actual or imminent \* \* \* a mere transfer by documents which would be sufficient to bind the parties is not sufficient to change the property as against captors, as long as the ship or goods remain *in transitu*. \* \* \*

The true ground on which the rule rests \* \* \* is that, while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods. The difficulty of detecting frauds if mere paper transfers are held sufficient is so great, that

the courts have laid down that in order to defeat the captors the possession as well as the property must be changed before the seizure. \* \* \* The only question of law which can be raised is how long the *transitus* continues, and when and by what means it is terminated. \* \* \* It is true that in one sense the ship and goods may be said to be *in transitu* till they have reached their original port of destination, but "for the present purpose "the *transitus* ceases when the property has come into the actual possession of the transferee," as it may do by the ship's calling at an intermediate port where the transferee can take possession.

Westlake, vol. 2, pp. 171, 172; *The Baltica*, 11 Moore P. C., 145, 146.

With regard to property at sea, it often happens that the enemy owners of merchantmen entitled to fly the enemy flag endeavor at the outbreak of war, or even in anticipation of it, to transfer their vessels to neutrals in order that the neutral flag may protect them from capture, and sometimes these transfers are merely colorable. Belligerents are therefore obliged to take precautions against evasion of their rights. The rules laid down by maritime powers in order to effect this purpose proceeded on similar lines, but did not agree in every particular. The subject was, therefore, discussed at the Naval Conference of 1908-1909 with a view to bringing about uniformity; and a unanimous agreement was reached. Its terms are embodied in Articles 55 and 56 of the Declaration of London.

Lawrence, p. 380.

#### Conflicting practice.

The question of the transfer of enemy vessels to subjects of neutral States, either shortly before or during the war, must be regarded as forming part of the larger question of enemy character, for the point to be decided is whether such transfer divests these vessels of their enemy character. It is obvious that, if this point is answered in the affirmative, the owners of enemy vessels can evade the danger of having their property seized and confiscated by selling their vessels to subjects of neutral States. Before the Declaration of London, which is, however, not yet ratified, the maritime Powers had not agreed upon common rules concerning this subject. According to French practice no transfer of enemy vessels to neutrals could be recognised, and a vessel thus transferred retained enemy character; but this concerned only transfer after the outbreak of war, any legitimate transfer anterior to the outbreak of the war, did give neutral character to a vessel. According to British and American practice, on the other hand, neutral vessels could well be transferred to a neutral flag before or after the outbreak of war and lose thereby their enemy character, provided that the transfer took place *bona fide*, was not effected either in a blockaded port or while the vessel was *in transitu*, the vendor did not retain an interest in the vessel or did not stipulate a right to recover or repurchase the vessel after the conclusion of the war, and the transfer was not made *in transitu* in contemplation of war.

Oppenheim, vol. 2, pp. 117, 118.



**Contra.**

According to the law of nations, neutrals have the right to purchase during war the property of belligerents, whether ships or anything else; and any regulation of a particular state, which contravenes this doctrine, is against public law, and in mere derogation of the sovereign authority of all other independent states.

A citizen of the United States may at this time lawfully purchase a merchant ship of either of the belligerents, Turkey, Russia, Great Britain, France, or Sardinia; if purchased *bona fide*, such ship becomes American property and entitled as such to the protection and to the flag of the United States; and although she cannot take out a register by our law, yet that is because she is foreign built, not because she is belligerent built; and she can obtain a register by special act of Congress.

Opinions United States Attorney's General, vol. 6, p. 638. The doctrine of the right of neutrals to purchase the ships of belligerents reaffirmed. 7 id., p. 538.

**Contra.**

"Inquiries having been addressed to this Department as to the right of a citizen of the United States to purchase a vessel of a belligerent during the existing war in Europe, I have to inform you that a similar question arose during the late Crimean war, was deliberately and carefully investigated by the Administration for the time being, and resulted in a conviction, that a vessel so purchased, in good faith, becomes the property of the purchaser, and is entitled to the protection of the flag of the United States, though a special act of Congress would be necessary to enable her to obtain a register from the proper Department.

"These views are entirely concurred in by the existing executive government of the United States, and will be maintained whenever there may be occasion therefor."

Mr. Cass, Secretary of State, to United States consuls, circular, No. 10, June 1, 1859, Moore's Digest, Vol. VII, pp. 417, 418.

In reply to a request for some sanction or approval of the proposed transfer of enemy vessels to a neutral in a blockaded Cuban port in 1898, the Department of State said that it could not "give desired permission or concede any privilege because of transfer from belligerent to neutral in a blockaded port. Vessels might be allowed to sail subject to capture and to adjudication by prize court of bona fides of transaction and of effect, if any, of mortgage, on national character of vessels, prior to transfer."

Mr. Moore, Assistant Secretary of State, to Messrs. Butler, Notman, Joline, and Mynderse, May 10, 1898, Moore's Digest, Vol. VII, p. 422.

The commander will be justified in treating as a British vessel—

\* \* \* \* \*

4. Any vessel apparently owned by a person having a neutral commercial domicile, if such person has acquired the ownership by a transfer from a British subject made after the vessel had started upon the voyage during which she is met with, and has not yet actually taken possession of her.

5. Any vessel apparently owned by a person having a neutral commercial domicile, if such person has acquired the ownership by a transfer from a British subject made at any time during the war, or previous to the war but in contemplation of its breaking out, unless there is satisfactory proof that the transfer was *bona fide* and complete.

Holland, p. 13.

The Commander will be justified in treating as an Enemy Vessel:—

\* \* \* \* \*

4. Any Vessel apparently owned by a British, Allied or Neutral subject, as hereinafter defined (*see* secs. 41, 42, 49, 55, 56), if such person has acquired the ownership by a Transfer from an Enemy made after the Vessel had started upon the Voyage during which she is met with, and has not yet actually taken possession of her.

5. Any Vessel apparently owned by a British, Allied, or Neutral subject, if such person has acquired the ownership by a Transfer from an Enemy made at any time during the war, \* \* \* unless there is satisfactory proof that the Transfer was *bona fide* and complete. In the event of such a Transfer being alleged, the Commander should call for the Bill of Sale, and also for any Papers or Correspondence relating to the same. If the Bill of Sale is not forthcoming, and its absence is unaccounted for, he should detain the Vessel. If the Bill of Sale is produced, its contents should be carefully examined, especially in the following particulars:

- a. The Name and Residence of the Vendor.
- b. The Name and Residence of the Purchaser.
- c. The Place and Date of the Purchase.
- d. The Consideration-money and the Receipt.
- e. The Terms of the Sale.

f. The Service of the Vessel and the Name of the Master, both before and after the Transfer.

The Name and Residence of the Vendor are material to show whether or not he was an Enemy.

The Name and Residence of the Purchaser are material to show whether or not he was a person resident in British, Allied, or Neutral Territory.

The Date and Place of the Purchase are material to show whether or not the Transfer was made in contemplation or in consequence of the war.

The Consideration-money is material, in case the Vessel is alleged to have been transferred by Sale, to show whether or not the transaction was *bona fide*. For if the transaction was professedly a Sale, then the fact that the consideration was nominal or wholly inadequate would be a just cause for suspicion. But a Transfer by way of gift or bequest will, if *bona fide* and complete, be as valid as a Transfer by way of Sale.

The Receipt for the purchase-money should be called for in case the Vessel is alleged to have been transferred by Sale; but if there is proof that the Sale was *bona fide* and in other respects complete, the Transfer will be good, although no Receipt is forthcoming, and even although the Purchase-money has not in fact been paid. For the Prize Court does not consider any lien which an Enemy vendor may have upon a Vessel or Cargo or Freight for unpaid purchase-

money to be a subsisting Enemy's interest rendering the Vessel liable to confiscation. However, the fact that the Purchase-money, instead of having been paid in Cash, has only been carried to an account, will raise the presumption of the Transfer being merely colorable, and such presumption can be rebutted only by clear proof to the contrary.

The terms of the Sale are material to show whether the transfer was complete. The Transfer would not be complete if the Sale was not absolute; as, if it contained a Power of Revocation, or a condition for a return of the Vessel at the close of the war, or a reservation of the profits of the Vessel, or of any control over her to be left in the hands of the former Owner.

The Service of the Vessel, and the Name of the Master both before and after the Transfer, are material to show whether or not the Transfer be a genuine one; for if the Service has continued unaltered by the Transfer, the Commander will be justified in holding the Transfer to be colorable only. The fact that the same Master is retained in command after the Transfer raises a suspicion, but, standing alone, will not be conclusive that the Transfer was not *bona fide*.

If the Transfer is *bona fide* and complete as between the parties, the fact that it was effected in fraud of the Revenue or the law of the Mercantile Marine of any Foreign Country will be immaterial.

If the Purchase was made through an Agent, the Letters of Procuration should be called for.

Holland, pp. 6 and 7.

Merchant-vessels purchased from a hostile Power or its subjects by persons of a neutral nationality are to be considered enemy's vessels, unless it is proved that their purchase must be regarded, under the laws of the nation to which the purchasers belong, as having been definitely concluded before the purchasers received information of the declaration of war, or that the vessels were purchased in the manner indicated after the purchasers received that information, but that the purchase was made in perfect good faith, and not with the object of protecting enemy's property.

Russian Regulations, 1895, Article 7.

The officer should close the examination and detain the vessel in the following cases:—

\* \* \* \* \*

(e) If it appears from the papers that the vessel has been bought by the subject of a neutral State from subjects of the enemy, and there is reason to suppose that a fictitious sale has taken place with the object of protecting enemy's property.

Russian Instructions, 1900, sec. 18.

By enemy ships are meant those enumerated below:—

\* \* \* \* \*

4. Ships the ownership of which has been transferred by the hostile state, or by individuals of that nation, \* \* \* while the war is in actual progress, to a person domiciled in Japan or in a neutral country, there being no proof that the transfer of ownership was *bona fide* and complete.

When the ownership of a ship is transferred while she is on her voyage, and actual delivery has not yet taken place, the transfer of ownership shall be regarded as not *bonâ fide* and complete.

Japanese Regulations, 1904, Article 6.

As enemy ships are further to be treated those which after the beginning of hostilities have been transferred from a hostile to a neutral flag, provided,

(a) either the captain is not convinced that the transfer would have been made had there been no outbreak of war, or, for instance, in case of inheritance, or building contract;

(b) or the transfer is effected while the ship was in passage or in a blockaded port:

(c) or a repurchase or return agreement is reserved;

(d) or the conditions are not fulfilled upon which the right to carry the flag depends, according to the legal requirements of the state concerned.

German Prize Rules, 1909, Article 12.

When the captain is not in a position to determine to which flag a vessel which has been transferred to a neutral flag formerly belonged he is authorized to assume that she belonged to the enemy flag.

German Prize Rules, 1909, Article 15.

#### Treatment of crew of captured vessel.

If a ship is captured under 10 to 16a, as an enemy ship [including cases of illegal transfer] \* \* \*, the master, officers, and members of the crew—as far as they are of the enemy's nationality,—will not be made prisoners of war, if they bind themselves on the strength of a formal written promise to engage in no service, during the period of the war, that may have any connection with the hostile undertakings of the enemy.

German Prize Rules, 1909, Article 100.

Sections 112 and 113, French Naval Instructions, 1912, are identical with Article 56, Declaration of London.

Article 56, Declaration of London, is substantially identical with by divine law upon nations at war.'

#### Contra.

"The law of nations secures to neutrals unrestricted commerce with the belligerents, except in articles contraband of war, and trade with blockaded or besieged places. With these exceptions commerce is as free between neutrals and belligerents as if it were carried on solely between neutral nations; and it is difficult to conceive upon what principle an exception can be made and the neutral deprived of the rights secured in regard to the purchase of merchant vessels.

"It is true a regulation of France has been referred to in support of the doctrine avowed by the Imperial Government, but it is hardly necessary to observe that a municipal law of that country can only affect persons under its control, and can have no binding force beyond its territorial limits. The parties who made the con-

tract for the sale and purchase of the ship *St. Harlampy* were not under the jurisdiction of the municipal law of France; on the contrary, they were both within the jurisdiction of the United States as well as the property which formed the subject of the transaction. The validity or invalidity of the transaction can be determined only by the local or international law. It was a contract authorized by the laws of this country and the law of nations; and it was supposed to be universally conceded that such a contract would be respected everywhere. Certainly no government except that under which the contract was made could interpose to destroy or vary the obligations which its provisions impose if not contrary to the law of nations. This is the doctrine of the European publicists, and it is especially sustained by Hautefeuille, whose authority will, I doubt not, be recognized by the Emperor's Government. He says, 'It is impossible to recognize such a right as that claimed by the regulation of France.' 'Commerce,' he adds, 'is free between the neutral and belligerent nations; this liberty is unlimited except [by] the two restrictions relative to contraband of war, and to places besieged, blockaded, or invested; it extends to all kinds of provisions, merchandise, and movable objects without exception. Pacific nations can then, when they judge proper, purchase the merchant ships of one of the parties engaged in hostilities, without the other party having the right to complain, without, above all, that it should have power to censure, to annul these sales, to consider and treat as an enemy, a ship really neutral and regularly recognized by the neutral Government as belonging to its subjects. To declare null and without obligation a contract, it is indispensable that the legislator should have jurisdiction over the contracting parties. It is then necessary, in order that such a thing should take place, to suppose that the belligerent possesses the right of jurisdiction over neutral nations. That is impossible; the pretension of the belligerents is an abuse of force, an attempt against the independence of pacific nations, and consequently a violation of the duties imposed by divine law upon nations at war.'

"However long may be the period during which this doctrine has formed part of the municipal code of France, it is manifestly not in harmony with her maritime policy, and it is confidently believed by this Government that France will not assert it not only against the practice of other nations but against the authority of her most enlightened writers on public law."

Mr. Marcy, Secretary of State, to Mr. Mason, minister to France, February 19, 1856, Moore's Digest, vol. VII. pp. 416, 417.

#### French position.

No. 12.—*Earl Granville to Consul Medhurst.*

FOREIGN OFFICE, *April 12, 1871.*

"SIR: I have had under my consideration in communication with the Law Advisers of the Crown, your despatches of the 25th of January and 1st of February reporting the circumstances connected with the capture of the barque *Robert Rickmers* by the officer commanding the French Naval Squadron; and I have now to state to

you that it has been the long established rule of the French Prize Courts not to allow the sale of an enemy's vessel to a neutral after the commencement of war to change its national character, so as to exempt it from capture on the high seas. The right of France to observe such a rule can not be impugned, and the French Courts have acted upon it, both when France was at war with England in 1801, and when she was the ally of England against Russia in 1854. Under these circumstances, although Great Britain may be content to observe a milder rule, as in the case of the *Ariel*, upon which Mr. Ronnie relied in advising you, the rule of the English Courts is not binding upon France; and I am of opinion that you were in error in protesting against the capture of the *Robert Rickmers* by the French Admiral.

"I transmit for your information a copy of a letter which I have caused to be addressed to Mr. Rickmers, in reply to an application which he made to me on the subject."

I am, etc.,

GRANVILLE.

W. H. MEDHURST, Esq.

Contra.

"The Consular Regulations stated that 'foreign-built vessels, purchased and wholly owned by citizens of the United States, whether purchased of belligerents or neutrals, during a war to which the United States are not a party, or in peace, of foreign owners, are entitled to the protection and flag of the United States as the property of American citizens.' The same instructions, however, require that the purchase should have been in good faith. The purpose of the authority to consuls in the matter obviously was to enable citizens of the United States residing abroad to buy foreign-built vessels for lawful trade. It was not intended to sanction a simulated purchase of such vessels, to be employed in hostile operations against countries with which the United States are at peace. Although, if the purchase in this instance was a *bona fide* transaction, it may be that a vessel so employed by the purchaser may not have technically violated the neutrality law of the United States, still her employment in the business in which those vessels engaged, while flying the flag of this country, was contrary to the spirit of that act, and at variance with the friendship then existing between the United States and the King of the Two Sicilies. In point of fact, the examination which has been made has given rise to a doubt whether the alleged purchase of the vessels referred to was a *bona fide* transaction for a valuable consideration, or was only simulated in order that the flag of the United States might be used to screen them from capture by the Neapolitan navy on their way to and from Sicily. It can not be doubtful how far the authority or the countenance of this Government should be employed in behalf of a claim if it should prove to be of this latter character."

Mr. Fish, Secretary of State, to Mr. Marsh, minister to Italy, January 29, 1877, Moore's Digest, vol. VII, p. 418.

"It is notorious that a maritime war scarcely ever occurs when at least one of the belligerents does not seek to protect more or less of its shipping by a neutral flag. In some instances this may honestly

be done, but sales of vessels of belligerents to neutrals in apprehension of war, or when hostilities may have actually broken out, are always more or less liable to suspicion, and such transactions justify the strictest inquiry on the part of the belligerent who thereby may have been defrauded of his right to capture enemy's property. There are various circumstances tending to show the good faith, or the reverse, of such transfers. Prominent among these is the ability of the alleged purchaser to pay for his bargain.

"If, prior to the sale, he was notoriously incapable of making any such purchase, or if his previous pursuits did not fit him for the use of the property, these and other obvious circumstances will tend to show a want of that good faith which alone can impart the rights of a neutral to a vessel so acquired. I am sorry to say that instances are not wanting where impecunious citizens of the United States have claimed to be the purchasers of foreign craft, and in some of them have actually had the hardihood to apply to this Department for its interposition, when the terms of their contract may not, in their opinion, have been complied with by the other party."

Mr. Evarts, Secretary of State, to Mr. Christiancy, minister to Peru, June 20, 1879, For. Rel. 1879, 884.

"This Government is in receipt of information that ships carrying the Spanish flag have been, or are about to be, furnished with British or other neutral papers upon colorable transfers of ownership, made for the purpose of avoiding belligerent capture. It is desired that any such cases coming to your notice should receive your immediate attention, and that steps should be taken to prevent the colorable and void transfers of vessels under the Spanish flag to a neutral flag."

Mr. Day, Secretary of State, to the Diplomatic and Consular Officers of the United States, July 1, 1898, For. Rel. 1898, 1176.

*The "Bernon,"* 1 C. Rob., 102-7.—This was a case of the capture by the British of a ship claimed to have been purchased during war between Great Britain and France from a Frenchman by an American residing in France. The evidence respecting the sale appears to have consisted only of a formal bill of sale, a note in part payment and a receipt, all verified only by the affidavit of the claimed purchaser, who seems to have given false evidence on other points bearing upon the transaction. Held, that the ship should be condemned, and the court said that the purchase of an enemy's vessel in time of war is liable to great suspicion, which is increased when the asserted neutral purchaser appears to be a resident in the enemy's country at the time of sale.

*The "Juffrouw Anna,"* 1 C. Rob., 124a.—In this case, the vessel, which had ostensibly been sold by an enemy to a neutral, was condemned because of these circumstances: "a suspension of the claim for eight months, the false representation of the claimant, the direct employment of the vessel in the enemy's trade, and false papers."

*The "Argo,"* 1 C. Rob., 158.—This was a case of alleged transfer of ownership of a vessel from a Frenchman to a Prussian and it appeared that the claimed owner had sent a master, previously unknown to him and without other directions than to go to the former owner, in France, who had supplied the master with money and directions for the voyage and turned over the vessel to him. The claimed owner

seemed to have exercised no other authority in the matter and the master could produce no correspondence with him.

The vessel was condemned.

*The "Two Brothers," 1 C. Rob., 131.*—This was the case of an ostensible purchase of a French vessel, by an American residing in France. The only documentary evidence produced was an unauthenticated bill of sale, no correspondence was produced between the claimed owner and the master, and the latter destroyed some papers "before capture."

The vessel was condemned.

*The "Welvaart," 1 C. Rob., 127.*—This was the case of a ship claimed to have been purchased by a neutral in France, then at war with England.

The vessel was condemned because of the following circumstances: no bill of sale was produced; the vessel appeared to have been engaged, when captured, in the coasting trade of France, and the bills of lading gave a false destination and a false representation of property.

The Court said: "It is permitted to neutrals by this country to purchase ships in the enemy's country—a liberty which France has always denied. We certainly do allow it, but only to persons conducting themselves in a fair neutral manner, and not accessory to the purposes of the enemy."

*The "Endraught," 1 C. Rob., 21.*—This was the case of a vessel, the ownership of which had ostensibly been transferred from an enemy to a neutral. The master said he believed the transfer to be collusive, and the vessel continued to trade with enemy ports, and with a crew signed in such ports and a master whom the court considered an enemy subject.

The vessel was condemned.

*The "Vigilantia," 1 C. Rob., 1-15.*—This was a case of a capture by the British of a vessel claimed to have been purchased, during war between Great Britain and Holland, by a Prussian subject from a Hollander. The ship continued under the same master and in her former trade between Holland and Greenland and while certain papers found on board tended to show (but not satisfactorily) that the sale had been made, depositions made by the master, the mate, and another seaman set forth their opinions that the sale was a collusive one, to conceal the real ownership.

Held that the vessel should be condemned, apparently on the ground that as she was engaged altogether in a Dutch traffic, she must be considered as a vessel of Holland.

See also *The Odin*, 1 C. Rob., 248; *The Susa*, 2 C. Rob., 255.

*The "Sechs Geschwistern," 4 C. Rob., 100.*—This was a case of a ship claimed to have been purchased by a neutral of its former French owner. It appeared that the claimed purchaser had given back a mortgage on the vessel for a part of the purchase price, and had also bound himself to indemnify the alleged seller for any loss suffered by reason of violating the French requirement against the sale of a French vessel, without the condition of restitution after the war. Other circumstances appeared to indicate that the sale was not complete.



The vessel was condemned, and the court said, that a sale of this nature, to be valid under the British rule must divest the enemy of all further interest in the vessel, and "that any thing tending to continue his interest, vitiates a contract of this description altogether."

*The "Omnibus,"* 6 C. Rob.—This vessel was transferred by a bill of sale in which it was stipulated that the former master should not be removed. The vessel continued under his management and in the same course of trade (to an enemy port) never once going to the port of her pretended owner.

Held that the vessel should be condemned.

*The "Minerva,"* 6 C. Rob., 396.—This was the case of a Dutch man-of-war which was pursued by a British frigate into a neutral port and there claimed to have been purchased by a neutral individual, after which most of her armament was removed and she was sent on a trip, nominally to another neutral port, but under circumstances tending to show that she was destined to Holland.

Held, that "the transaction of this purchase, taking it to have been made, has been conducted in a manner that cannot be considered as legal." The court said: "There have been cases of merchant vessels driven into ports out of which they could not escape, and there sold, in which, after much discussion, and some hesitation of opinion, the validity of the purchase has been sustained."

#### Property in transit.

*The "Ann Green,"* 1 Gallison, 274.—In this case the court said that in time of war property cannot change its character *in transitu*.

*The "Island Belle,"* 13 Fed. Cases, p. 171.—The court said: "Assuming the truth to be that, as between Mr. Sawyer and the former owners, their proprietorship was divested irrevocably and that he was, at the time of capture the absolute owner of the vessel, as ownership is definable in a court of common law, she would, nevertheless, be liable, in a prize court, to condemnation. The rule of decision in some countries has been that, as to a vessel, no change of ownership during hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no change of property is recognised where the disposition and control of a vessel continue in the former agent of her former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile."

#### Vessels in transit.

*The "Baltica,"* 11 Moore, P. C. 145, 146.—The court said: "\* \* \* in case of war \* \* \* it is settled that \* \* \* a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors, so long as the ship or goods remain *in transitu*."

*The "Ernest Merck,"* 2 Spinks, pp. 87-93.—This vessel was alleged to have been sold, during the Crimean war, by her Russian owners, to subjects of Mecklenburg and was seized in a British port while on her way to a Russian port to engage in her former trade, in which she was to continue under the control of the agent of the claimed vendors. There appeared to be suspicious circumstances in connec-

tion with the sale and in connection with the alleged change of nationality of her master, from Russian to Mecklenburg.

The vessel was condemned.

*The "Johanna Emilie," Spinks Prize Cases, 12.*—In this case the court said: "With regard to the legality of the sale, assuming it to be *bona fide*, it is not denied that it is competent to neutrals to purchase the property of enemies to another country, whether consisting of ships or anything else; they have a perfect right to do so, and no belligerent right can override it."

The court ordered further proof, and said: "I must be satisfied that the sum given for the vessel was an adequate amount under all the circumstances; I must be satisfied that that money was *bona fide* paid; I must have all the correspondence produced which passed between the master and the gentleman resident in Riga; and I must have evidence from the claimant himself of all the facts and circumstances within his knowledge. With less than that the court will not feel itself satisfied, and at liberty to restore the ship."

#### Contra.

In the case of *The "Baltica,"* supra, the court said "The general rule is in no doubt. A neutral \* \* \* after it [a war] has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. \* \* \* But in case of war \* \* \* it is settled that \* \* \* a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors, so long as the ship or goods remain *in transitu*."

11 Moore, P. C. 145, 146.

#### Sale of ship of war.

*The "Georgia," 7 Wall., 32-44.*—The Georgia was a Confederate war-vessel, which, on May 2, 1864, entered the harbor of Liverpool, England, to avoid capture by the United States men-of-war. She was there dismantled and after public advertisement, sold for a valuable consideration to a British subject, who fitted her up as a merchant vessel, on her first voyage as which she was captured.

Held that the vessel should be condemned on the ground that a *bona fide* purchase for a commercial purpose by a neutral, in his own home port, of a ship of war of a belligerent, that had fled to such port in order to escape from enemy vessels in pursuit, but which was *bona fide* dismantled prior to the sale and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent.

The court said: "The distinction between the purchase of vessels of war from the belligerent, in time of war, by neutrals in a neutral port, and of merchant vessels, is founded on reason and justice. \* \* \* The question in this case cannot arise under the French code, as according to that law, sales even of merchant vessels to a neutral, *flagrento bello*, are forbidden. And it is understood that the same rule prevails in Russia. Their law, in this respect, differs from the established English and American adjudications on this subject."

*The "Benito Estenger,"* 176 U. S., 568.—This was the case of a vessel captured by the United States during the war with Spain, and it appeared that after the outbreak of the war the vessel was transferred from a Spanish subject to a British subject. No money appears to have been paid in consideration of the transfer, but it was claimed that credit had been given for the purchase price. The Spanish master and crew remained in charge; the seller was on board as super-cargo, and it was admitted that he retained a beneficial interest.

The court stated that "transfers of vessels *flagrante bello* were originally held invalid," but that the rule had been "modified." The court referred, as giving the correct rule of law, to the passage from Hall, quoted above under this heading, held that the burden of proof in the case under consideration was upon the claimant, that he had not sustained the burden and that the condemnation was proper.

FLAG VESSEL ENTITLED TO FLY DETERMINES HER NEUTRAL OR ENEMY CHARACTER—  
EXCEPTIONS.

Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly. •

The case where a neutral vessel is engaged in a trade which is closed in time of peace, remains outside the scope of, and is in no wise affected by, this rule.—*Declaration of London, Article 57.*

The rule in the declaration of Paris that “the neutral flag covers enemy goods, with the exception of contraband of war;” corresponds so closely with the advance of civilization and has taken so firm a hold on the public mind that it is impossible, in the face of so extensive an application, to avoid seeing in that rule the embodiment of a principle of the common law of nations which can no longer be disputed. The determination of the neutral or enemy character of merchant vessels accordingly decides not only the question of the validity of their capture, but also the fate of the non-contraband goods on board. A similar general observation may be made with reference to the neutral or enemy character of goods. No one thinks of contesting to-day the principle according to which “neutral goods, with the exception of contraband of war, are not liable to capture on board an enemy ship.” It is, therefore, only in respect of goods found on board an enemy ship that the question whether they are neutral or enemy property arises.

The determination of what constitutes neutral or enemy character thus appears as a development of the two principles laid down in 1856, or rather as a means of securing their just application in practice.

The advantage of deducing from the practices of different countries some clear and simple rules on this subject may be said to need no demonstration. The uncertainty as to the risk of capture, if it does not put an end to trade, is at least the most serious of hindrances to its continuance. A trader ought to know the risks which he runs in putting his goods on board this or that ship, while the underwriter, if he does not know the extent of those risks, is obliged to charge war premiums, which are often either excessive or else inadequate.

The rules which form this chapter are, unfortunately, incomplete. Certain important points had to be laid aside, as has been already observed in the introductory explanations and as will be further explained below.

The principle, therefore, is that the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly. It is a simple rule which appears satisfactorily to meet the special case of ships, as distinguished from that of other movable property, and notably of the cargo. From more than one point of view ships may be said to possess an individuality; notably, they have a nationality,

a national character. This attribute of nationality finds visible expression in the right to fly a flag. It has the effect of placing ships under the protection and control of the State to which they belong. It makes them amenable to the sovereignty and to the laws of that State and liable to requisition should the occasion arise. Here is the surest test of whether a vessel is really a unit in the merchant marine of a country, and here, therefore, the best test by which to decide whether her character is neutral or enemy. It is, moreover, preferable to rely exclusively upon this test and to discard all considerations connected with the personal status of the owner.

The text makes use of the words "the flag which the vessel is entitled to fly"; that expression means, of course, the flag under which, whether she is actually flying it or not, the vessel is entitled to sail according to the municipal laws which govern that right.

Article 57 safeguards the provisions respecting transfer to another flag, as to which it is sufficient to refer to articles 55 and 56; a vessel may very well have the right to fly a neutral flag, as far as the law of the country to which she claims to belong is concerned, but may be treated as an enemy vessel by a belligerent, because the transfer in virtue of which she has hoisted the neutral flag is annulled by article 55 or article 56.

Lastly, the question was raised whether a vessel loses her neutral character when she is engaged in a trade which the enemy, prior to the war, reserved exclusively for his national vessels; but as has been observed above in connection with the subject of unneutral service, no agreement was reached, and the question remains an open one, as the second paragraph of article 57 is careful to explain.

Report of committee which drafted Declaration of London.

All vessels sailing under the flag of the United States, and furnished with such papers as their laws require, shall be regarded in Italy as vessels of the United States, and, reciprocally, all vessels sailing under the flag of Italy, and furnished with the papers which the laws of Italy require, shall be regarded in the United States as Italian vessels.

Treaty of Commerce and Navigation concluded between the United States and Italy, February 26, 1871, Article XVII.

Merchant vessels navigating under the flag of the United States as that of Japan and carrying the papers required by their national laws to prove their nationality shall in Japan and in the United States be deemed to be vessels of the United States or of Japan, respectively.

Treaty of Commerce and Navigation concluded between the United States and Japan, February 21, 1911, Article X.

#### **Acquisition of the right to the flag of a State.**

Article 1. The ship should be inscribed on the register kept for this purpose by authorized officials, in conformity with the laws of the State.

Article 2. To be inscribed on this register, more than half the ship must be the property:

1. Of nationals; or
2. Of a company under a collective name or a *commandite*, of which more than half the members personally responsible are nationals; or

3. Of a national stock company (joint-stock or *commandite*), two-thirds at least of the directors of which are nationals; the same rule applies to associations and other legal persons owning ships.

Article 3. The concern (whether an individual ship-owner, a company or corporation) must have its head-quarters in the State whose flag the ship must fly and in which it must be registered.

Article 4. Each State shall determine the conditions to be fulfilled in order to be appointed captain or first officer of a merchant ship: but the nationality of the captain or that of the members of the crew shall not be a condition of acquiring or forfeiting the right to the national flag.

#### **Forfeiture of the right to the flag of a State.**

Article 5. Failure to comply with one of the conditions under which this right may be acquired does not entail forfeiture of this right until after the ship has been erased from the register. Such erasure is made at the request of the owners or of the management of the ship, or by the authority intrusted with the register, except as provided for by Articles 7 and 8 below.

Article 6. The owner or the management which shall have neglected to send the necessary notification to this authority shall be liable to a fine.

Article 7. If the change in ownership of a share in the ship causes the forfeiture of the right to the flag, the owners shall be granted a suitable length of time, in order to take the measures necessary for the ship to retain its former nationality, or to acquire another.

Article 8. If, after the expiration of this period, those interested have not taken the measures necessary to attain one of these two ends, the ship shall be erased from the register, and the person responsible for the loss of nationality or his heirs, if the loss of nationality is due to his death, shall be liable to fine.

#### **Temporary acquisition of the right to the flag.**

Article 9. Temporary acquisition of the right to a flag occurs in two cases:

1. When a ship, built abroad, cannot definitely acquire the right to a flag until after its arrival in one of the ports of the owner's State;
2. When a ship changes owners while in a foreign port.

Article 10. In each of these two cases, the consuls and consular agents residing in the country in which the ship is, shall be charged with the giving of a provisional certificate, if the essential conditions imposed by law for acquiring the nationality of the ship be fulfilled; this certificate shall be valid only during a period to be determined by law.

Institute, 1896, pp. 135-137.

The enemy or neutral character of a vessel is determined by the flag which it is entitled to fly.

Institute, 1913, p. 186.

#### **Exception.**

Sailing under the flag and pass of an enemy is another mode by which a hostile character may be affixed to property; for if a neutral vessel enjoys the privileges of a foreign character, she must expect,

at the same time, to be subject to the inconveniences attaching to that character. This rule is necessary to prevent the fraudulent mask of enemy's property. But a distinction is made, in the English cases, between the ship and the cargo. Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also; but the English courts have never carried the principle to that extent, as to cargoes laden before the war. The English rule is, to hold the ship bound by the character imposed upon it by the authority of the government from which all the documents issue. But goods which have no such dependence upon the authority of the state may be differently considered; and if the cargo be laden in time of peace, though documented as foreign property in the same manner as the ship, the sailing under a foreign flag and pass has not been held conclusive as to the cargo. The doctrine of the federal courts in this country has been very strict on this point, and it has been frequently decided that sailing under the license and passport of protection of the enemy, in furtherance of his views and interests, was, without regard to the object of the voyage or the port of destination, such an act of illegality as subjected both ship and cargo to confiscation as prize of war.

Kent, vol. 1, pp. 94, 95.

#### Exception.

This subject of flags and papers needs elucidation. Where a State has authority to inquire into the national character of a merchant vessel apparently of another State, for any purpose, whether of war or peace, it cannot be bound by the flags or papers used. It can go behind the ostensible nationality indicated by these, and ascertain the actual nationality, which depends on the domicil of the owner and other facts. The State may, if it chooses, hold the ship concluded by the fact of having used the flags and papers she has knowingly carried, if that result is favorable to the interests of the State. This is usually done in war, and may be done in peace. It is simply the application to the inquiry of a rule of conclusive presumption or *estoppel* against a party. Whether it shall be enforced depends on State policy. The vessel cannot claim the application of the rule in its own favor. So, if it shall appear that the flags and papers of a certain nation are used by the permission of that nation in the particular case, giving to the vessel a spurious national character, that permission does not affect the right of the State making the inquiry, as between itself and the owner of the vessel, to go beyond the flags and papers and ascertain the actual nationality, and treat the vessel accordingly. If the nation which has granted the permission should interpose, the question is a political one between the two nations.

Dana's Wheaton, Note 163.

So also, in general, and unless under special circumstances, the character of ships depends on the national character of the owner, as ascertained by his domicil; but if a vessel is navigating under the flag and pass of a foreign country, she is to be considered as bearing the national character of the country under whose flag she sails: she makes a part of its navigation, and is in every respect liable to be considered as a vessel of the country; for ships have a peculiar char-

acter impressed upon them by the special nature of their documents, and are always held to the character with which they are so invested, to the exclusion of any claims of interest which persons resident in neutral countries may actually have in them.

Dana's Wheaton, p. 425.

#### Exception.

Thus, ships are deemed to belong to the country under whose *flag* and *pass* they sail; at least, this circumstance is conclusive, as against the party who takes the benefit of them, although they do not bind *other parties*, as against him. So, a ship belonging to a neutral owner may acquire a hostile character from the trade in which she engages, or some particular act which she may do.

Halleck, p. 487.

\* \* \* when a ship sails under a hostile flag, she has, by whomsoever owned, a hostile character.

Woolsey, p. 298.

#### The " *Virginus* " case.

The *Virginus*, carrying the flag of the United States, and supposed for sometime to be a regularly registered vessel of the United States, was captured by a Spanish war-steamer on the high sea, while endeavoring to reach the neutral waters of the island of Jamaica, having been foiled in the attempt to land a party of insurrectionists on the Cuban coast. The capture occurred in the night of October 31, 1873. \* \* \*

It was afterward proved that the *Virginus* was not legally a vessel of the United States. The real owners from the first were Spaniards. The oath of the American in whose name she was registered was false. \* \* \*

The following rules of international law are illustrated by the case of the *Virginus*:—

1. \* \* \*

2. That a nation's right of jurisdiction on the high seas over vessels owned by its citizens or subjects, authorizes the detention and capture of a vessel found on the high seas, which upon reasonable ground is believed to be owned by its citizens or subjects, and to be engaged in violating its laws. The flag or register of another nation, if not properly belonging to a vessel, does not render its detention unlawful by the cruiser of a nation to which its owners belong. As, however, the register affords *prima facie* evidence of nationality, the nation which gave the register by mistake must be treated with great care, detention on grounds proved to be erroneous must be atoned for, and the question of ownership would naturally be committed, where the evidence is not patent, to a third party.

Woolsey, pp. 366, 367, 370.

Private vessels belonging to a state are those which, belonging to private owners, satisfy such conditions of nationality as may be imposed by the state laws with reference to ownership, to place of construction, the nationality of the captain, or the composition of the crew. In common with vessels of war the flag is the apparent sign of the nationality of the ship, but as a merchant vessel is not in the



same close relation to the state as a public vessel, and its commander, unlike the commander of the latter, is not an agent of the state, recourse is not had to his affirmation in proof of its character, which must be shown by papers giving full information as to its identity and as to its right to carry the flag displayed by it, or, in other words, as to whether it has conformed to the laws of its state.

Hall, p. 171.

#### Exceptions.

A ship chartered by the enemy, or navigated by an enemy captain and crew would be treated as enemy property, even though she belonged to a neutral owner, and the same fate would befall a neutral ship habitually sailing under the enemy's flag or taking a pass or license from the enemy.

Lawrence, p. 382.

If a ship sails under the enemy flag, the character which her owner or any of her partowners may have as individuals is immaterial. By accepting the flag they have placed themselves under its protection: if that fails them she may be captured and will be condemned, and no share which a friend may have in her will be saved.

Westlake, vol. 2, pp. 169, 170.

The general rule with regard to vessels is that their character is determined by their flag. Whatever may be the nationality of the owner of a vessel—whether he be a subject of a neutral State, or of either belligerent—she bears enemy character, if she be sailing under the enemy flag. For this reason, the vessel of an enemy owner which sails under a neutral flag does as little bear enemy character as the vessel of the subject of a neutral State sailing under the flag of another neutral State. But the flag is the deciding factor only when the vessel is legitimately sailing under it. Should it be found that a vessel sailing under the flag of a certain neutral State has, according to the Municipal Law of such State, no right to fly the flag she shows, the real character of the vessel must be determined in order to decide whether or no she bears enemy character. On the other hand, it makes no difference that the owner be the subject of a neutral non-littoral State without a maritime flag and that the vessel is, therefore, compelled to fly the flag of a maritime State: if the flag the vessel flies be the enemy flag, she bears enemy character.

The general rule that the flag is the deciding factor has exceptions, and it is convenient to expound the matter according to the rules of the Declaration of London, although it is not yet ratified. The general rule is laid down by article 57 of the Declaration which enacts that, subject to the provisions respecting transfer to another flag, the character of a vessel is determined by the flag she is entitled to fly. Nevertheless, there are two exceptions to this rule:—

(1) According to article 46 of the Declaration a neutral merchantman acquires enemy character by taking a direct part in the hostilities, by being in the exclusive employment of the enemy government, and by being at the time exclusively intended either for the transport of troops or for the transmission of intelligence for the enemy. And it must be emphasised that the act by which a neutral merchantman acquires enemy character need not necessarily be committed *after* the

outbreak of war, for she can, even *before* the outbreak of war, to such a degree identify herself with a foreign State that, with the outbreak of war against such State, enemy character devolves upon her *ipso facto*, unless she severs her connexion with the State concerned. This is, for instance, the case of a foreign merchantman which in time of peace has been hired by a State for the transport of troops or of war material, and is carrying out her contract in spite of the outbreak of war.

(2) According to article 63 of the Declaration a neutral merchantman acquires enemy character *ipso facto* by forcibly resisting the legitimate exercise of the right of visitation and capture on the part of a belligerent cruiser.

Oppenheim, vol. 2, pp. 112-114.

#### Contra.

The Flag and Pass of a Neutral Government are not conclusive in favour of the Neutral character of a Vessel, which depends on her being the property of Neutral Subjects, as hereinafter defined.

Holland, p. 16.

If a Vessel appear to belong to a Neutral, and there is evidence that she was formerly a British or Allied Vessel, and was captured by the Enemy, and taken into an Enemy's Port for Adjudication, the Commander, will, in default of direct evidence to the contrary, presume that she has been regularly condemned in the Enemy's Court of Prize, and has thereby become the lawful property of the Neutral.

Holland, p. 17.

The nationality of a vessel is to be decided in accordance with the laws of the country under the flag of which she is sailing, or to the fleet of which she claims to belong.

Russian Regulations, 1895, Article 7.

The character of a ship, whether enemy or neutral, will be determined by the flag which she has a right to carry.

Which flag a ship has the right to carry is proven, under the navigation laws of nearly all seafaring states by some official document (ships-register, nationality-certificate, Lettre de Mer, Acte de Francisation, Sea letter, Pass, Patent, License, etc.), which each merchant vessel must have on board.

When the nationality of a ship can not unquestionably be determined, especially if the document necessary to indicate the right to carry the flag of the nation concerned is missing, the ship is to be treated as hostile.

German Prize Rules, 1909, Article 11.

Paragraph 1, Section 27, French Naval Instructions, 1912, is substantially identical with paragraph 1, Article 57, Declaration of London.

Article 57, Declaration of London, is substantially identical with section 9, Austro-Hungarian Manual, 1913.

*The "Thea," Russian and Japanese Prize Cases, vol. 1, p. 96.*—This was the case of a German vessel, leased for nine months to a Japanese Company. It appeared that by German Law, the vessel was entitled to fly the German flag.

Held by the Supreme Court that the nationality of the vessel was German.

Held further, that the fact that this vessel was engaged in the coasting trade of Japan did not cause her to lose her national character, according to the laws of Russia.

*The "Juliette," Russian and Japanese Prize Cases, vol. 2, p. 103.*—This was the case of a small steamer not ocean-going and used only as a launch in a Japanese harbor. She was entitled to fly the Russian flag, and was owned by a merchant who had been established in Japan, but had withdrawn to Russian territory before the outbreak of the war, after which the vessel continued to be used by his manager in the Japanese port.

Held by the Japanese Prize Court that the steamer should be condemned as an enemy ship.

#### Nationality of stockholders in an enemy company not material.

*The "Manchuria," Russian and Japanese Prize Cases, vol. 2, p. 52.*—This was a case of a captured vessel owned by a Russian company and flying the Russian flag. Most of the stockholders in the company were neutrals.

Held by the Japanese Prize Court that the ship was an enemy ship and liable to condemnation.

#### The excepted case—Rule of War of 1756.

If a neutral engages in a commerce which is exclusively confined to the subjects of another country, and which is interdicted to all others, so that it cannot be carried on at all in the name of a foreigner, such a commerce is considered so entirely national as to follow the situation of the country, and to impress its hostile character upon the property engaged in it. In the war of 1756, the French government allowed the Dutch, then neutral, to carry on the commerce between the mother country and her colonies, under special licenses granted for this particular purpose, other neutrals being excluded from the same trade. Vessels so employed were captured by British cruisers, and, together with their cargoes, condemned by the British prize courts. In the opinion of these courts the vessels were to be considered like transports in the enemy's service, and the property as so completely identified with the enemy's interests as to acquire a hostile character. The doctrine of these decisions has been frequently affirmed by the prize courts of England and America, and by the opinions of the most eminent text-writers of other countries. It has generally been designated by publicists as the "rule of the war of 1756."

Few now contest the correctness of the rule of 1756, that where neutrals, by a special indulgence, are permitted, in time of war, to engage in a commerce of the enemy which is purely national, and from which they are excluded in time of peace, necessarily impresses them with a hostile character.

If a neutral's ship sails under an enemy's license to trade, she becomes hostile; for why should she have the advantages of a close connection with the enemy without the disadvantages?

Woolsey, p. 298.

Certain kinds of trade, as the coasting and colonial, have been by the policy of most nations confined to national vessels in time of peace; and neutrals have been allowed to participate in them only when war rendered the usual mode of conveyance unsafe. It would appear, that to make such trade lawful, licenses were granted to particular vessels, and the belligerent captor could, with justice, take the ground, that the vessel under license had identified itself with the enemy. \* \* \* The grounds on which the rule [of 1756] stood were, that the neutral interfered to save one of the belligerents from the state of distress to which the arms of his foe had reduced him, and thus identified himself with him. The neutral states have never allowed that the rule forms a part of the international code. \* \* \*

Here two questions may be asked, the one touching the lawfulness of coasting trade proper, the other touching the conveyance by neutrals of their goods, brought out of foreign ports, from one port of the enemy to another. \* \* \* Judge Story says ("Life and Letters," i., 285-289) that, \* \* \* "The British have unjustly extended the doctrine to cases where a neutral has traded between ports of the enemy with a cargo taken in at a neutral country." \* \* \* To open coasting trade to neutrals is a confession of inability to carry on that branch of trade on account of apprehensions from the enemy's force, and an invitation to neutrals to afford relief from the pressure of war. It is to adopt a new kind of vessels, on the ground that they cannot be captured. The belligerent surely has the right to say that his attempts to injure his enemy shall not be paralyzed in this manner. But he has no right to forbid the neutral to carry his own goods from hostile port to hostile port, when he might have done it before. Every right of innocent trade, then, enjoyed by the neutral in peace, should be allowed after the breaking out of the war; but new rights, given to them on account of the war, may be disregarded by the belligerent as injuring his interests.

Woolsey, pp. 339, 341.

It was formerly the policy with all European governments to exclude foreign ships from trade with their colonies, and though this rule has been destroyed or modified, it is still unusual to permit strangers to engage in the coasting trade from one port to another of the home country.

These exclusions gave rise to the question whether if a belligerent throws open his close trade in time of war either to a favoured neutral or to all neutrals, his enemy has a right to deny to them the enjoyment of the proffered advantages. \* \* \*

There can be no question that a special privilege, \* \* \* exposes the neutral to be suspected of collusion with the belligerent whose favours he accepts; and that he cannot complain if the enemy of his friend forms a harsh judgment of his conduct. The matter stands otherwise if a trade is opened to all neutrals indifferently. \* \* \*

The justice of this doctrine [that upon the neutral lies the burden of proving that his new trade is harmless to the belligerent; and if he fails in this proof, the support which he affords to the enemy may be looked upon as intentionally given] was strongly contested by the American government; it has since remained a subject of lively debate in the writings of publicists; and it cannot be said to have been sanctioned by sufficient usage to render such debate unnecessary. Nor is it easy to see that the question has necessarily lost its importance to the degree which is sometimes thought. The more widely the doctrine is acted upon that enemy's goods are protected by a neutral vessel, the more necessary it is to determine whether it ought to be governed in a particular case by exceptional considerations.

The arguments which may be urged on behalf of the right of neutrals to seize every occasion of extending their general commerce do not seem to be susceptible of a ready answer. Neutrals are in no way privy to the reasons which may actuate a belligerent in throwing open a trade which he has previously been unwilling to share with them; they can be no more bound to enquire into his objects in offering it to them than they are bound to ask what it is proposed to do with the guns which are bought in their markets. The merchandise which they carry is in itself innocent, or is rendered so by being put into their ships; in the case of coasting trade they take it to ports into which they can carry like merchandise brought from a neutral harbour; and the obstructing belligerent is unable to justify his prohibition by any military strength which it confers upon him. On the one hand the neutral is free from all belligerent complicity with a party to the war; on the other the established restrictive usages afford no analogy which can be extended to cover the particular case.

Hall, pp. 660-663.

In the wars growing out of the French Revolution, in which the rule [of 1756] was revived, American vessels, which had then come upon the seas as neutral carriers, sought to avoid its application by first bringing the cargo to the United States and thence carrying it on to its European or colonial destination, as the case might be. To thwart this mode of prosecuting the trade, Sir William Scott applied what was called the doctrine of continuous voyages.

Moore's Digest, vol. vii, p. 383; *The Polly*, 2 C. Rob., 361; *The Martin*, 5 C. Rob., 365.

It is still doubtful what would be the fate of neutral ships engaged in a trade which before the war had been reserved by the enemy for his own merchantmen, but was thrown open by his government during the war or in anticipation of it. Great Britain has, under what is called her Rule of War of 1756, claimed the right to regard such vessels as enemy vessels, and at the Naval Conference she supported a German proposal to insert in the Declaration of London a rule embodying her view. The attempt was, however, foiled by the strong opposition of the United States and several other powers. The matter is, therefore, left open. It may in the end be decided

by the International Prize Court, or it may be settled at the next Hague Conference. A reasonable compromise might be found in a rule that permitted such a trade to neutrals if it were thrown open generally and for all future time, but forbade it if the permission were confined to the vessels of one or more privileged countries or limited in time to the duration of the war then raging.

Lawrence, pp. 382, 383.

According to British practice—adopted by America and Japan—neutral merchantmen likewise acquire enemy character by violating the so-called rule of 1756, in case they engage in time of war in a trade which the enemy prior to the war reserved exclusively for merchantmen sailing under his own flag. The Declaration of London has neither rejected nor accepted this rule of 1756, for article 57 stipulates expressly that the case where a neutral vessel is engaged in a trade which is closed in time of peace, remains unsettled. It would, therefore, according to article 7 of Convention XII. of the Second Peace Conference, be the task of the proposed International Prize Court to settle this point.

Oppenheim, vol. 2, p. 114.

Under what is known as the "Rule of the War of 1756," it was held, down to the early years of the present century, that Neutral Vessels were liable to Detention for engaging in a trade which in time of peace was closed to Vessels other than those of the Enemy State. The colonial and coasting trades, at one time customarily closed to foreign Vessels, are, however, now so generally open to the Ships of all Nations, that the Rule in question has perhaps lost its practical importance. Its operation would also be interfered with by the second clause in the Declaration of Paris of 1856, to the effect that "the Neutral flag covers Enemy's goods, with the exception of Contraband of War." In any case, the Rule is not to be enforced by Commanders of British cruisers without special instructions.

Holland, p. 41.

A neutral ship is to be treated as an enemy ship further when it—

(a) engages in a voyage which is permitted only after the outbreak of the war, or within two months before.

German Prize Rules, 1909, Article 16.

"With respect to the particular rights to be placed under the guaranty of a general treaty of peace, it will naturally occur that the one having the first place in the wishes of the United States is that which is at present violated by the British principle subjecting to capture every trade opened by a belligerent to a neutral nation during war, \* \* \* It will be recollected that this right stands foremost in the list comprised in the two plans of armed neutrality in 1780 and 1800. In general it is to be understood that the United States are friendly to the principles of those conventions, and would see with pleasures all of them effectually and permanently recognized as principles of the established law of nations."

Mr. Madison, Secretary of State, to Mr. Armstrong, minister to France, March 14, 1806, Moore's Digest, Vol. VII, p. 387.

The principle that "a trade opened to neutrals by a nation at war, on account of the war, is unlawful," has no foundation in the law of nations.

Mr. Madison, Secretary of State, report of January 25, 1806, Moore's Digest, vol. vii, p. 1107.

The rights of a neutral to carry on a commercial intercourse with every part of the dominions of a belligerent permitted by the laws of the country (with the exception of blockaded ports and contraband of war) was believed to have been decided between Great Britain and the United States by the sentence of their commissioners mutually appointed to decide on that and other questions of difference between the two nations, and by the actual payment of the damages awarded by them against Great Britain for the infractions of that right. When, therefore, it was perceived that the same principle was revived with others more novel and extending the injury, instructions were given to the minister plenipotentiary of the United States at the court of London, and remonstrances duly made by him on this subject, as will appear by documents transmitted herewith. These were followed by a partial and temporary suspension only, without any disavowal of the principle. He has, therefore, been instructed to urge this subject anew, to bring it more fully to the bar of reason, and to insist on rights too evident and too important to be surrendered. In the meantime the evil is proceeding under adjudications founded on the principle which is denied. Under these circumstances the subject presents itself for the consideration of Congress.

President Jefferson, special message, January 17, 1806, Richardson's Messages, I, 395.

"The declaration which Her Britannic Majesty's Government proposes to issue is distinct in interdicting to neutrals the coasting and colonial trade with the belligerent, if not enjoyed by them previous to the war. In regard to this trade, you are aware that Great Britain asserted principles, in the wars resulting from the French revolution, before she issued her obnoxious orders in council, which this country held to be in violation of the law of nations. Should she still adhere to those principles in the coming conflict in Europe, and have occasion to apply them to our commerce, they will be seriously controverted by the United States, and may disturb our friendly relations with her and her allied belligerents. The liberal spirit she has indicated in respect to the cargoes under a neutral flag, and neutral property which may be found on board of enemies' ships, gives an implied assurance that she will not attempt again to assert belligerent rights, which are not well sustained by the well-settled principles of international law."

Mr. Marcy, Secretary of State, to Mr. Buchanan, April 13, 1854, H. Ex. Doc. 103, 33 Cong., 1 sess., 12, 13, Moore's Digest, vol. vii, p. 1108.

*The "Ann Green," 1 Gallison, 274.*—The court said that where a neutral is engaged in a trade, which is in time of peace exclusively confined to the subjects of a country, and forbidden to all others, such a trade is so purely national, that it must follow the situation of the country, as to peace or war, and be deemed hostile or neutral accordingly; and that, in such trade, it is immaterial whether the shipment be made in time of peace or war.

*Vasse v. Ball*, 2 Dallas, 270.—In this case the court maintained that there was no violation of neutrality in the trading by an American vessel with French islands, which was unlawful before the existing war between France and England.

*The Emanuel*, 1 C. Rob., 296.—The court said: “\* \* \* in the ordinary state of affairs, no indulgence is generally permitted to the ships of most other countries to carry on the coasting trade. I think therefore the *onus probandi* does at least lie on that side and always makes it necessary to be shown by the claimants, that such a trade was not a mere indulgence, and a temporary relaxation of the coasting system of the state in question; but that it was a common and ordinary trade, open to the ships of any country whatever \* \* \*.”

*The “Immanuel,”* 2 C. Rob., 186.—This was the case of a Hamburg ship, seized during war between England and France, because it was engaged in the trade between France and a French Colony, a trade which apparently was closed to neutrals in time of peace, but had been opened to them after the breaking out of war.

Held that neutrals had no right to engage in such trade.

*The “William,”* 5 C. Rob., 385.—Held that an attempt, by touching at a neutral port, to avoid the “Rule of 1756” forbidding neutrals to engage in the direct trade between the enemy and its colonies, did not make the voyage lawful.

*The “Montara,” Russian and Japanese Prize Cases*, vol. 2, p. 403.—This was the case of a neutral ship which was chartered by a Russian company for the purpose of carrying on a trade which was closed in time of peace to foreign vessels. It appeared that upon the outbreak of war this company and one other company had been allowed by the Russian Government to charter foreign vessels to engage in the trade in question.

Held that the above facts were sufficient to constitute the vessel a ship sailing with a special license from the enemy. Ship and cargo were condemned.



Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes, which could be obtained by search.

If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.—*Declaration of London, Articles 61 and 62.*

The principle laid down is simple; a neutral vessel under the convoy of a warship of her own nationality is exempt from search. The reason for this rule is that the belligerent cruiser ought to be able to find in the assurances of the commander of the convoy as good a guaranty as would be afforded by the exercise of the right of search itself; in fact, she can not call in question the assurances given by the official representative of a neutral government without displaying a lack of international courtesy. If neutral governments allow belligerents to search vessels sailing under their flag, it is because they do not wish to be responsible for the supervision of such vessels, and therefore allow belligerents to protect themselves. The situation is altered when a neutral government consents to undertake that responsibility; the right of search has no longer the same importance.

But it follows from the explanation of the rule respecting convoy that the neutral government undertakes to afford the belligerents every guaranty that the vessels convoyed shall not take advantage of the protection accorded to them in order to do anything inconsistent with their neutrality, as, for example, to carry contraband, render un-neutral service to the belligerent, or attempt to break blockade. There is need, therefore, that a genuine supervision should be exercised from the outset over the vessels which are to be convoyed; and that supervision must be continued throughout the voyage. The government must act with vigilance so as to prevent all abuse of the right of convoy, and must give to the officer who is put in command of a convoy precise instructions to this effect.

A belligerent cruiser encounters a convoy; she communicates with the commander of the convoy, who must, at her request, give in writ-

ing all relevant information about the vessels under his protection. A written declaration is required, because it prevents all ambiguities and misunderstandings, and because it pledges to a greater extent the responsibility of the commander. The object of such a declaration is to make search unnecessary by the mere fact of giving to the cruiser the information which the search itself would have supplied.

In the majority of cases the cruiser will be satisfied with the declaration which the commander of the convoy will have given to her, but she may have serious grounds for believing that the confidence of the commander has been abused, as, for example, that a ship under convoy of which the papers are apparently in order and exhibit nothing suspicious is, in fact, carrying contraband cleverly concealed. The cruiser may, in such a case, communicate her suspicions to the commander of the convoy, and an investigation may be considered necessary. If so, it will be made by the commander of the convoy, since it is he alone who exercises authority over the vessels placed under his protection. It appeared, nevertheless, that much difficulty might often be avoided if the belligerent were allowed to be present at this investigation; otherwise he might still suspect, if not the good faith, at least the vigilance and perspicacity of the person who conducted the search. But it was not thought that an obligation to allow the officer of the cruiser to be present at the investigation should be imposed upon the commander of the convoy. He must act as he thinks best; if he agrees to the presence of an officer of the cruiser, it will be as an act of courtesy or good policy. He must in every case draw up a report of the investigation and give a copy to the officer of the cruiser.

Differences of opinion may occur between the two officers, particularly in relation to conditional contraband. The character of a port to which a cargo of corn is destined may be disputed. Is it an ordinary commercial port, or is it a port which serves as a base of supply for the armed forces? The situation which arises out of the mere fact of the convoy must in such a case be respected. The officer of the cruiser can do no more than make his protest, and the difficulty must be settled through the diplomatic channel.

The situation is altogether different if a vessel under convoy is found beyond the possibility of dispute to be carrying contraband. The vessel has no longer a right to protection, since the condition upon which such protection was granted has not been fulfilled. Besides deceiving her own government, she has tried to deceive the belligerent. She must therefore be treated as a neutral merchant vessel encountered in the ordinary way and searched by a belligerent cruiser. She can not complain at being exposed to such rigorous treatment, since there is in her case an aggravation of the offense committed by a carrier of contraband.

Report of committee which drafted Declaration of London.

Although the vessels of the one and of the other party may navigate freely and with all safety, as is explained in the 7th article, they shall, nevertheless, be bound, at all times when required, to exhibit, as well on the high sea as in port, their passports and certificates above mentioned; and, not having contraband merchandize on board for an enemy's port, they may freely and without hindrance pursue their voyage to the place of their destination. Nevertheless, the ex-

hibition of papers shall not be demanded of merchant-ships under the convoy of vessels of war, but credit shall be given to the word of the officer commanding the convoy.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, Article XII.

If, in any future war at sea, the contracting Powers resolve to remain neuter, and as such to observe the strictest neutrality, then it is agreed that if the merchant ships of either party should happen to be in a part of the sea where the ships of war of the same nation are not stationed, or if they are met on the high sea, without being able to have recourse to their own convoys, in that case the commander of the ships of war of the other party, if required, shall, in good faith and sincerity, give them all necessary assistance; and in such case the ships of war and frigates of either of the Powers shall protect and support the merchant-ships of the other: provided, nevertheless, that the ships claiming the assistance are not engaged in any illicit commerce contrary to the principle of the neutrality.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, separate Article 3.

To ensure to the vessels of the two contracting parties the advantage of being readily and certainly known in time of war, it is agreed that they shall be provided with the sea-letters and documents hereafter specified:

1. A passport, expressing the name, the property, and the burthen of the vessel, as also the name and dwelling of the master, which passport shall be made out in good and due form, shall be renewed as often as the vessel shall return into port, and shall be exhibited whensoever required, as well in the open sea as in port. But if the vessel be under convoy of one or more vessels of war, belonging to the neutral party, the simple declaration of the officer commanding the convoy, that the said vessel belongs to the party of which he is, shall be considered as establishing the fact, and shall relieve both parties from the trouble of further examination.

Treaty of Amity and Commerce concluded between the United States and Prussia, July 11, 1799, Article XIV.

\* \* \* and if the commander of a ship of war of either party shall have other ships under his convoy, the declaration of the commander shall alone be sufficient to exempt any of them from examination.

Treaty of Peace and Friendship, concluded between the United States and Morocco, September 16, 1836, Article IV.

It is further agreed that the stipulations above expressed relative to the visiting and examination of vessels shall apply only to those which sail without convoy; and when said vessels shall be under convoy, the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and when they may be bound to an enemy's port that they have no contraband goods on board, shall be sufficient.

Treaty of Peace, Amity, Navigation and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XXIII.

It is further agreed that the stipulations above expressed, relative to the visiting and examination of vessels, shall apply only to those which sail without convoy; and when said vessels shall be under convoy, the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and, when they are bound to an enemy's port, that they have no contraband goods on board, shall be sufficient.

Treaty of Peace, Friendship, Commerce, and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XXIII.

It is agreed that the stipulations contained in the present treaty relative to the visiting and examining of a vessel shall apply only to those which sail without a convoy; and when said vessels shall be under convoy the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and when bound to an enemy's port, that they have no contraband goods on board, shall be sufficient.

Treaty of Commerce and Navigation concluded between the United States and Italy, February 26, 1871, Article XIX.

When neutral merchant vessels are convoyed, they shall not be visited, if the commander of the convoying vessel sends to the vessel of the belligerent which has stopped it, a list of the convoyed vessels, and a declaration signed by him showing that they do not carry any contraband of war, and showing the nationality and destination of the convoyed vessels.

Institute, 1882, p. 48.

Vessels convoyed by a neutral war-ship are not subject to visit except in so far as permitted by the rules relating to convoys.

Institute, 1913, p. 181.

#### **Contra.**

The very act of sailing under a belligerent or neutral convoy, for the purpose of resisting search, is a violation of neutrality.

Kent, vol. 1, p. 162.

#### **Contra.**

This history of practices, conventions, and opinions is enough to show that international law does not prohibit search of convoyed vessels, nor substitute the word of the commander for actual search.

Note 242, Dana's Wheaton.

Since the peace of 1815, European treaties have generally, except where England was a party, stipulated for the exemption of merchant vessels, under the convoy of public ships of the same state. The treaties which the United States have made with foreign powers, both before and since that period, have generally provided that in case of convoy, the declaration of the commander of the convoy, that the vessels under his protection belong to the nation whose flag he carries, and when bound to an enemy's port, that they have no contraband goods on board, shall be sufficient.

Halleck, p. 615.

Recent continental publicists, have generally contended that neutral convoy exempts the convoyed vessel from visitation and search. Some have stated this proposition in general terms, while others limit it to merchant vessels convoyed by ships of war of their own nation, and put it on the ground that the declaration of the commander is sufficient as to the character and cargoes of the vessels of his own country under his escort and protection. Such are the general views of Martens, Rayneval, Klüber, Heffter, Massé, and Ortolan. Rayneval, however, is of the opinion that if the belligerent vessel should inform the convoying commander that he has evidence that one or more of the vessels under his escort are liable to capture for being really enemy's vessels, or because they have on board contraband goods, destined to an enemy's port, the commander should immediately proceed, in concert with the belligerent cruiser, to verify the truth of these allegations. This opinion is concurred in by Ortolan; but Hautefeuille thinks that such examination, if made, should be by the neutral officer only, and that his word, as to the character of his convoy, must suffice. This author has discussed the question of convoy at great length, and with marked ability. It must, however, be remembered, that he attempts to represent what *ought to be* the rule of international law on this subject, rather than what that law *really is* at the present time. English text-writers have adopted the opinion of Sir William Scott, with respect to the *right* to visit and search vessels under neutral convoy, and the effect of such convoy, when it tended to impede and defeat this belligerent right. Manning denies that neutrals, under convoy, can claim, under the general law of nations, to be exempted from search, as a matter of right, but he deems it desirable that it should be accorded to them by agreement. The United States have uniformly favored the rule of exemption, and have, whenever possible, introduced it into their treaties with other powers. It must, however, be stated that American publicists have generally admitted that the exemption can not be claimed as a matter of law, and that an attempt in this way to impede search will incur a penalty.

Halleck, pp. 615, 116.

The right of convoy, although not yet a part of international law, apparently approaches such a destiny, as it is now received by many jurists, and engrafted into the *conventional* law of almost all nations. Whether, as some put it, the word of honor of the commander of the convoying vessel ought to be sufficient proof, may fairly be doubted. The French orders to their naval officers, issued in 1854, for the war with Russia, deserve notice for contemplating this point. "You shall not," say they, "visit vessels which are under the convoy of an allied or neutral ship of war, and shall confine yourselves to calling upon the commander of the convoy for a list of the ships placed under his protection, together with his written declaration that they do not belong to the enemy, and are not engaged in any illicit commerce. If, however, you have occasion to suspect that the commander of the convoy has been imposed upon (*que la religion du commandant du convoi a été surprise*), you must communicate your suspicions to that officer, who should proceed alone to visit the suspected vessel."

On the ground of mere justice this right cannot be defended. It is said that the commander of the convoying vessel represents the state, and the state guarantees that nothing illicit has been put on board the merchantmen. But how can the belligerent know whether a careful search was made before sailing, whether the custom-house did not lend itself to deception? It is only by comity that national vessels are allowed their important privileges; how, except by a positive and general agreement, can those privileges be still further extended, so as to limit the belligerent right of search? On the ground of international good-will, however, the right is capable of defense, and, so far as we can see, except where the protected fleet is far separated by a storm from its guardian,—in which case, we suppose the ordinary right of search must be resumed,—can be exercised in the interests of belligerents as well as neutrals.

Woolsey, pp. 363, 364.

#### **Contra.**

But it is a controverted point whether neutral merchant vessels are liable to be visited, and are bound to suffer the visit, when sailing under convoy of ships of war of their own nation. \* \* \* There can be no question that the practice of visiting convoyed vessels had been universal until 1871; and that frequent treaties, in specifying the formalities to be observed, without limiting the extent of the right, had incidentally shown that the parties to them regarded the current usage as authoritative. \* \* \* Since then [1814] France has accepted the principle of this freedom from visit in six treaties, all with American republics; and the United States have embodied it in thirteen treaties, of which all, with two exceptions, have also been entered into with states on the same continent. But there has already been occasion to remark more than once that the treaties entered into by the United States afford little clue to the views entertained in that country; and on this point, as usually, English and American writers and judges are fully in accord. On the continent of Europe, Germany, Austria, Spain, and Italy, in addition to the Baltic powers and France, provide by their naval regulations that the declaration of a convoying officer shall be accepted. Great Britain on the other hand adheres to the practice upon which she has always acted.

Continental jurists are almost unanimous in maintaining the exemption from visit of convoyed ships, not only as a principle to be advocated, but as an established rule of law. That it has any pretension to be so is evidently inadmissible; the assertion of it, and the practice, which have been described, are insufficient both in kind and degree to impose a duty on dissenting states; and it cannot even be granted that the doctrine possesses a reasonable theoretic basis. The only basis indeed on which it seems to be founded is one which, in declaring that the immunity from visit possessed by a ship of war extends itself to the vessels in her company, begs the whole question at issue. It is more to the purpose to consider whether the privilege claimed by neutrals is fairly consistent with the interests of belligerents, and whether it would be likely in the long run to be to the advantage of neutral states themselves. It is argued that the commander of a vessel of war in charge of a convoy represents his government, that his affirmation pledges the faith of his nation, and that

the belligerent has a stronger guarantee in being assured by him that the vessels in company are not engaged in any illicit traffic, than in examining for himself papers which may be fraudulent. But unless the neutral state is to exercise a minuteness of supervision over every ship issuing from her ports which would probably be impossible, and which it is not proposed to exact from her, the affirmation of the officer commanding the convoy can mean no more than that the ostensible papers of the vessels belonging to it do not show on their face any improper destination or object. Assuming that the officials at the ports of the neutral country are always able and willing to prevent any vessel laden with contraband from joining a convoy, the officer in command must still be unable to affirm of the vessels under his charge, that no single one is engaged in carrying enemy's despatches or military passengers of importance; that none have an ultimate intention of breaking a blockade; or, if the belligerent nation acts on the doctrine that enemy's goods in a neutral vessel can be seized, that none of the property in course of transport in fact belongs to the enemy. If the doctrine is accepted, it would not infrequently happen that instances in which protection of a convoy has been abused will come afterwards to the knowledge of the belligerent to whose injury they have occurred; he will believe that the cases of which he knows are but a fraction of those which actually exist, he will regard the conduct of the neutral state with suspicion; complaints and misunderstandings will arise, and the existence of peace itself may be endangered. It cannot be too often repeated that the more a state places itself between the individual and the belligerent, the greater must be the number of international disputes. And belligerents will always look upon convoys with doubt, from the mere fact that their innocence cannot be tested. The neutrality of neutral nations is not always honest, and the temptation to pervert the uses of a convoy has not always been resisted; rightly or wrongly it will be thought, as it was thought in England during the French wars, that 'if there is any truth in the reasons stated for searching merchantmen not convoyed, it must be admitted that the presence of the convoy's ship, so far from being a sufficient pledge of their innocence, is rather a circumstance of suspicion. If a neutral nation fits out ships of war, and escorts all its trading vessels with them, we have a right to conclude that she is deviating from her neutrality.'

It cannot but be concluded that the principle of the exemption of convoyed ships from visit is not embraced in authoritative international law, and that while its adoption into it would probably be injurious to belligerents, it is not likely to be permanently to the advantage of neutrals. It is fortunate, in view of the collision of opinion which exists on the subject, that there is every reason to expect that the use of convoys will be greatly restricted in the future by the practical impossibility of uniting in a common body vessels of very different rates of speed, superior speed having become an important factor in commercial success.

Hall, pp. 747-754.

And from that time [1653] downwards the right of convoy has been in dispute, often by force, between Great Britain on the one hand and the Baltic powers and the Netherlands on the other hand. Those who claim the right require that the declaration of the com-

mander of a ship of war shall be accepted by the belligerent commanders whom he meets, as sufficient evidence that the merchantmen sailing under his protection have only innocent goods on board, and are not avowedly or constructively in the enemy's service, or engaged in any enterprise, such as blockade-running, which a belligerent is entitled to prevent. This view has obtained so wide a currency that now the United States, France, Germany, Austria, Spain, Italy, Japan and the Baltic Powers provide by their naval regulations that the declaration of a convoying officer shall be accepted. Great Britain on the other hand adheres to the practice upon which she has always acted.

In defence of the British contention it may be urged that, as long as international law does not make it the duty of a neutral state to prohibit the export of contraband, or otherwise to supervise in belligerent interest the commercial activity of its subjects, so far as that activity does not involve the use of its territory by a foreign power or its agents—so long a belligerent is not bound to accept the offer of a neutral state to undertake such supervision, and to substitute its own responsibility for that of the individuals with whom international law has left him to deal. Further, since any administrative procedures which the neutral government might adopt in its ports and markets would in the long run be conducted by methods of routine, and would usually be unaccompanied by such knowledge of suspicious circumstances as self-interest would prompt a belligerent to be diligent in acquiring, the declaration of the convoying officer would in practice mean little more than that the papers of the vessels under his protection showed no cause for belligerent interference on their face. Again, in the matter of contraband, the system of convoy would in effect compel the belligerent to be content with the neutral's definition of the articles to be considered as such. In truth the efforts of the Baltic powers to establish that system have been closely connected with their efforts to eliminate the naval materials which they produced from the list of contraband. But, well grounded as the British objection to the system of convoy appears to me, it must be admitted that in the present state of foreign opinion it may be difficult to maintain it in practice.

Westlake, vol. 2, pp. 300, 301.

We cannot leave the subject of ordinary neutral commerce without a brief notice of the controversy with regard to convoy. It is now happily ended; but in its time it produced two or three wars, and was always threatening to burst out afresh, like a volcano, and scatter destruction around. It arose out of the demand that neutral merchantmen should be free from belligerent search when under the escort of a war-ship or war-ships of their own country, whose commander was willing to pledge his word that nothing in the nature of their destination, or the character of any persons or things on board, rendered them liable to belligerent capture.

The first attempt to defeat in this way the ordinary belligerent right of search was made by Sweden in 1653. Peace supervened in a few months, and the question slumbered in consequence. It was not seriously raised again till the latter half of the eighteenth century, when the conduct of the Dutch roused it to vigorous life.



As neutrals they claimed for their merchantmen exemption from belligerent search when under the convoy of their ships of war; and therefore as belligerents they were bound to grant to others what they had demanded for themselves. Accordingly in January, 1781, they ordered their cruisers to refrain from searching neutral ships under convoy, if the commander of the convoying vessel declared them innocent of offence. Soon after a number of powers made mutual concessions of the privilege by special stipulations. The United States were among the foremost. Between 1782 and 1800 they agreed to the insertion of the provision under consideration in no less than six treaties. And not only have they continued this diplomatic policy; but they have also instructed their naval officers not to permit search of American vessels under their escort. But, nevertheless, American writers and jurists have held that, though belligerents may by treaty contract themselves out of their common law right of visit and search, they cannot be compelled in the absence of such agreement to take the word of a neutral officer in lieu of the evidence of their own senses. This was the British view, with the addition that any change in the law was to be resisted as dangerous. Great Britain therefore declined to enter into any of the agreements on the subject of convoy which were so common at the end of the eighteenth century, and insisted upon the full exercise of her belligerent right. This course of conduct brought her into sharp collision with some of the neutral states. The most important of these controversies arose in 1798 when a British squadron captured in the English Channel a number of neutral Swedish merchantmen under the escort of a Swedish frigate. They were condemned next year by Lord Stowell in a great judgement delivered in the case of one of them, called the *Maria*. He held that the right of search was "an incontestable right of the lawfully commissioned cruisers of a belligerent nation," that "the authority of the sovereign of the neutral country being interposed in any manner of mere force cannot legally vary the right," and that "the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search." The resistance to search in this particular case was very slight. No shot was fired and no blood was shed, and yet the captured vessels were condemned. But there can be little doubt of the soundness of the legal doctrines laid down by the great English judge, whatever may be thought of the severity with which he applied them. The Danish jurist Schlegel, who attempted to argue against them, relied upon a distinction between a Positive Law of Nations and a Natural Law of Nations. He admitted that the former allowed the search and capture of neutral vessels; but asserted that the latter knew nothing of such a right, and based upon this presumed contradiction the conclusion that belligerents cannot have a greater latitude in this respect than neutrals consent to allow. Influenced by arguments such as this, and by obvious considerations of self-interest, the Armed Neutrality of 1800 added to the four articles of its predecessor a fifth, to the effect that the declaration of an officer in command of a neutral ship of war that there was nothing contraband on board the vessels convoyed by him should suffice to prevent belligerent search. The second league of the Baltic powers came to an end in June, 1801, when Russia signed a treaty with

Great Britain which admitted the right of regular warships to search neutral vessels under convoy, but excluded privateers and stipulated for a special mode of procedure. The papers of the convoyed vessels were first to be examined on board the convoying vessel, and only if reasons for suspicion arose were the merchantmen themselves to be searched. The constant shifting of sides in the great continental wars soon brought this treaty to an end; and when fresh arrangements were made they were silent on the subject of convoy. The matter was not mentioned in the Declaration of Paris; and the fact that the opposing views we have described remained unreconciled, opened out prospects of serious trouble in the future. England still took her stand on the integrity of the right of search, while all the maritime powers of the European continent instructed their commanders at sea to rest content with the declaration of a convoying officer. When Japan emerged as a great naval power she adopted the continental position, and in 1894 applied it in her war with China. On the outbreak of the war with Russia in 1904 she again acted on it, with the provisos that the declaration of the officer in command of the convoy must be in writing, and that in cases of grave suspicion the immunity did not apply. English statesmen gradually came to see that they could not insist on the right to capture neutral vessels under convoy against the opposition of the rest of the world, and a conviction of its diminishing value helped to bring about a determination to abandon it. Now that speed is an essential in most mercantile voyages, steamers will not wait while a convoy is made up, as sailing vessels did a century ago. Influenced by these considerations Great Britain, at the Naval Conference of 1908-1909, expressed her willingness to give up her old position, if reasonable securities against the abuse of the desired immunity could be obtained. These the other powers were quite willing to concede, and a satisfactory settlement of the long-standing difficulty was reached in the Declaration of London of 1909.

Lawrence, pp. 669-672.

Sweden in 1653, during war between Great Britain and the Netherlands, claimed that the belligerents ought to waive their right of visitation over Swedish merchantmen if the latter sailed under the convoy of a Swedish man-of-war whose commander asserted the absence of contraband on board the convoyed vessels. The Peace of Westminister in 1654 brought this war to an end, and in 1756 the Netherlands, then neutral, claimed the right of convoy. But it was not until the last quarter of the eighteenth century that the right of convoy was more and more insisted upon by Continental neutrals. During the American War of Independence in 1780, the Netherlands again claimed that right, and when they themselves in 1781 waged war against Great Britain, they ordered their men-of-war and privateers to respect the right of convoy. Between 1780 and 1800 treaties were concluded, in which Russia, Austria, Prussia, Denmark, Sweden, France, the United States of America and other States recognised that right. But Great Britain always refused to recognise it, and in July 1800 the action of a British squadron in capturing a Danish man-of-war and her convoy of six merchantmen for resistance to visitation called the Second Armed Neutrality into existence. Yet Great

Britain still resisted, and by article 4 of the "Maritime Convention" of St. Petersburg of June 17, 1801, she conceded to Russia only that vessels under convoy should not be visited by privateers. During the nineteenth century more and more treaties stipulating the right of convoy were concluded, but this right was not mentioned in the Declaration of Paris of 1856, and Great Britain refused to recognise it throughout the century. However, Great Britain abandoned her opposition at the Naval Conference of London of 1908-9.

Oppenheim, vol. 2, pp. 535-536.

**Contra.**

No Vessel is exempt from the exercise of these powers [of visit, search and detention] on the ground that she is under the Convoy of a Neutral Public Ship.

Holland, p. 2.

**Contra.**

Any resistance made by a Neutral Convoying Ship to the lawful Visit and Search of a Vessel under her escort, will justify the Detention both of the Convoying Ship and of all Vessels convoyed by her.

Holland, p. 44.

Merchant-vessels convoyed by ships of war of an allied or neutral Power are not to be subjected to examination, if the Commander of the convoy gives an assurance as to the number of the vessels convoyed, their nationality and the destination of their cargoes, and also that there is no contraband of war on board. The stoppage and examination of such vessels is permissible only in the following circumstances:—

(1) If the Commander of the convoy declines to give the assurance indicated above;

(2) If he states that any of the vessels are not sailing under his convoy; and

(3) If it is evident that a vessel under convoy is preparing to do something which constitutes a breach of neutrality.

Russian Regulations, 1895, Article 6.

Convoys of neutral merchant vessels, under escort of vessels of war of their own State, are exempt from the right of search, upon proper assurances, based on thorough examination, from the commander of the convoy.

U. S. Naval War Code, 1900, Article 30.

Neutral ships under convoy of their men-of-war flag are exempt from visit and search. The commander of the convoy has to give the captain in writing at his request, concerning the character of the ship or her cargo, any information which could be ascertained by searching.

If the captain has reason to believe that the commander of the convoy has been deceived, he will inform him of his reasons for his suspicion. In such case it is the duty of the commander of the convoy alone to have an investigation. He must state the results of the investigation in a protocol of which a copy is to be given to

the officer of the belligerent ship. Should the ascertained facts in the opinion of the commander of the convoy justify the seizure of one or more ships, the protection of the convoy must be withdrawn from them. Should on the other hand the commander of the convoy believe that he may still answer for the innocence of the convoyed ships, the captain may only enter a protest against this decision; he will then report the case to the Admiral Staff, for settlement through diplomatic channels.

It rests with the commander of the convoy whether or not to permit a representative of the captain to take part in the investigation.

German Prize Rules, 1909, Article 5.

As regards the vessel under convoy, the commander of the convoy will give to you in writing, on your request, all information as to the character of the convoyed vessels and their cargoes which could be obtained by visit and search.

If you have reason to suspect that the confidence of the commander of the convoy has been abused, you will communicate your suspicions to him. In such a case it is for the commander of the convoy alone to conduct an investigation. You may, however, accept an offer made you by him to be present at this investigation. He should state the result of such search in a report of which a copy is furnished to one of your officers. If in the opinion of the commander of the convoy the facts thus stated justify the capture of one or more vessels, the protection of the convoy should be withdrawn from such vessels, and you should proceed to such seizure.

If differences arise between you and the commander of the convoy, especially with respect to contraband, you may only address to him a written protest. You will immediately make a report thereof to me, and the difficulty will be settled through the diplomatic channel.

For a neutral, the fact of having himself convoyed by an enemy warship, that is to say, placing himself under its protection, casts suspicion upon him and deprives him of any right to complain if he is damaged or even destroyed in a fight.

For an enemy merchant ship, the act of having himself convoyed by an enemy warship exposes him to all attacks, direct and indirect.

French Naval Instructions, 1912, secs. 103-107.

Articles 61 and 62, Declaration of London, are substantially identical with sections 147, 148, respectively, Austro-Hungarian Manual, 1913.

Mr. Seward, replying, August 12, 1861, to an inquiry of the Dutch minister as to whether the United States recognised the rule of convoy embraced in the instructions of the Netherlands to the commander of its naval forces bound to North American waters, said: "No objection is entertained to a recognition of the rule so far as it may apply to merchant vessels proceeding under convoy to ports not blockaded. No merchant vessels of the Netherlands, however, or of any other power, will be allowed to enter a port blockaded by the naval forces of the United States, whether such vessel be under convoy or without it."

Mr. Seward, Secretary of State to Mr. Von Limburg, August 12, 1861, Moore's Digest, Vol. VII, p. 493.

**Contra.**

*The "Maria,"* 1 C. Rob., 340.—This was the case of a Swedish neutral merchantman, which was taken, while sailing under convoy of a Swedish man-of-war, and proceeded against for resistance of visitation and search by British cruisers.

Held that a belligerent cruiser has the right of visiting and searching *all* merchant ships on the high seas, and that the interposition in any manner of mere force of the authority of the sovereign of the neutral country cannot *legally* vary the rights of a lawfully commissioned belligerent cruiser.

**FORCIBLE RESISTANCE TO STOPPAGE, SEARCH AND SEIZURE, EFFECT OF.**

**A. VISIT AND SEARCH.**

**B. NECESSARY SHIPS' PAPERS.**

**C. FORMALITIES OF CAPTURE.**

**D. LIENS UPON A VESSEL AS AFFECTED BY CAPTURE.**

**Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.—Declaration of London, Article 63,**

The subject treated in this chapter was not mentioned in the program submitted by the British Government in February, 1908, but it is intimately connected with several of the questions in that program, and thus attracted the attention of the conference in the course of its deliberations; and it was thought necessary to frame a rule upon it, the drafting of which presented little difficulty.

A belligerent cruiser encounters a merchant vessel and summons her to stop in order that she may be searched. The vessel summoned does not stop, but tries to avoid the search by flight. The cruiser may employ force to stop her, and the merchant vessel, if she is damaged or sunk, has no right to complain, seeing that she has failed to comply with an obligation imposed upon her by the law of nations.

If the vessel is stopped, and it is shown that it was only in order to escape the inconvenience of being searched that recourse was had to flight, and that beyond this she had done nothing contrary to neutrality, she will not be punished for her attempt at flight. If, on the other hand, it is established that the vessel has contraband on board, or that she has in some way or other failed to comply with her duty as a neutral, she will suffer the consequences of her infraction of neutrality, but in this case as in the last, she will not undergo any punishment for her attempt at flight. Expression was given to the contrary view, namely, that a ship should be punished for an obvious attempt at flight as much as for forcible resistance. It was suggested that the prospect of having the escaping vessel condemned as good prize would influence the captain of the cruiser to do his best to spare her. But in the end this view did not prevail.

The situation is different if forcible resistance is made to any legitimate action by the cruiser. The vessel commits an act of hostility and must from that moment be treated as an enemy vessel; she will therefore be subject to condemnation, although the search may not have shown that anything contrary to neutrality had been done. So far no difficulty seems to arise.

What must be decided with regard to the cargo? The rule which appeared to be the best is that according to which the cargo will be treated like the cargo on board an enemy vessel. This assimilation

involves the following consequences. A neutral vessel which has offered resistance becomes an enemy vessel and the goods on board are presumed to be enemy goods. Neutrals who are interested may claim their property, in accordance with article 3 of the declaration of Paris, but enemy goods will be condemned, since the rule that the flag covers the goods can not be adduced, because the captured vessel on board which they are found is considered to be an enemy vessel. It will be noticed that the right to claim the goods is open to all neutrals, even to those whose nationality is that of the captured vessel; it would seem to be an excess of severity to make such persons suffer for the action of the master. There is, however, an exception as regards the goods which belong to the owner of the vessel; it seems natural that he should bear the consequences of the acts of his agent. His property on board the vessel is therefore treated as enemy goods. A fortiori the same rule applies to the goods belonging to the master.

Report of committee which drafted Declaration of London.

The prize courts cannot condemn enemy or neutral prizes except on the following grounds:

- |  |   |   |   |   |   |   |
|--|---|---|---|---|---|---|
| *  | * | * | * | * | * | * |
| 3. Resistance to stopping, visit and search, or seizure. | * | * | * |   |   |   |
- Institute, 1883, p. 76.

Resistance of a merchant vessel to stopping, visit, search or seizure, should be proved in fact and manifested by acts; a simple protest of the resisting vessel cannot be sufficient to condemn it.

Institute, 1883, p. 76.

The vessel shall be condemned with its cargo:

- |                           |   |   |   |   |   |   |
|---------------------------|---|---|---|---|---|---|
| *                         | * | * | * | * | * | * |
| 2. In case of resistance. |   |   |   |   |   |   |
- Institute, 1883, p. 77.

Confiscation is applied, by way of penalty for resistance of search, to all vessels, without any discrimination as to the national character of the vessel or cargo, and without separating the fate of the cargo from that of the ship.

Kent, vol. 1, p. 163.

**Rescue by crew constitutes unlawful resistance.**

A rescue effected by the crew after capture, and when the captors are in actual possession, is unlawful, and considered to be a resistance within the application of the penalty of confiscation, for it is delivery by force from force. And where the penalty attaches at all, it attaches as completely to the cargo as to the ship, for the master acted as agent of the owner of the cargo, and his resistance was a fraudulent attempt to withdraw it from the rights of war.

Kent, vol. 1, p. 166.

The international law on this subject is ably summed up by Sir W. Scott, in the case of *The Maria*, where the exercise of the right was attempted to be resisted by the interposition of a convoy of Swedish ships of war. In delivering the judgment of the High Court of Admiralty in that memorable case, this learned civilian lays down the three following principles of law:— \* \* \*

3. That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.

Dana's Wheaton, pp. 690, 691; *The Maria*, 1 C. Rob. 340.

The *right* of search on the one side, implies the *duty* of submission on the other; and as the belligerent may lawfully apply his force to the neutral property, for the purpose of ascertaining its character and destination, it necessarily follows that the neutral may not lawfully resist the lawful exercise of the right of search. This duty of the neutral, says Sir William Scott, is founded on the soundest maxims of justice and humanity. There are no conflicting rights between nations at peace, and the right of search in the belligerent necessarily denies the right of resistance in the neutral. Any attempt, therefore, on the part of the neutral vessel, its owner, officers, or crew, to resist the lawful search of a duly commissioned cruiser of a belligerent power, is a violation of a duty imposed by the laws of war, and incurs a penalty proportioned to the nature of the offense.

Halleck, p. 609.

The penalty for the violent contravention of this right, is the confiscation of the property so withheld from visitation and search.

\* \* \* This penalty is not averted by the orders of the neutral sovereign to resist the visitation and search of the belligerent cruiser.

\* \* \* The resistance of the neutral cannot, therefore, be protected by any orders or instructions from its own government, but the act must be judged of according to its own character.

Halleck, pp. 611, 612.

The offence [of forcible resistance to a lawful search] being regarded as of a greater criminality and more dangerous in its effects than the transportation of contraband or the violation of a blockade, the severity of the penalty is the greater.

Halleck, p. 620.

It is plain, from the existence of the right of search, that an obligation lies on the neutral ship to make no resistance. The neutral is in a different relation to the belligerents than the vessels of either of them to the other. These can resist, can run away, unless their word is pledged, but he cannot. Annoying as the exercise of this right may be, it must be submitted to, as even innocent persons are bound to submit to a search-warrant for the sake of general justice. Any resistance, therefore, or attempt to escape, or to get free from the search or its consequences, by force, if they do not bring on the destruction of the vessel at the time, may procure its confiscation, even though it had been engaged in a traffic entirely innocent.

Woolsey, pp. 358, 359.

The right of capture on the ground of resistance to visit, and that of subsequent confiscation, flow necessarily from the lawfulness of visit, and give rise to no question. If the belligerent when visiting is within the rights possessed by a state in amity with the country to which the neutral ship belongs, the neutral master is guilty of an



unprovoked aggression in using force to prevent the visit from being accomplished, and the belligerent may consequently treat him as an enemy and confiscate his ship.

The only point arising out of this cause of seizure which requires to be noticed is the effect of resistance upon cargo when made by the master of the vessel, or upon vessel and cargo together when made by the officer commanding a convoy. The English and American courts, which alone seem to have had an opportunity of deciding in the matter, are agreed in looking upon the resistance of a neutral master as involving goods in the fate of the vessel in which they are loaded, and of an officer in charge as condemning the whole property placed under his protection.

Hall, pp. 756, 757.

\* \* \* The vessel is also confiscated if she resisted capture or search,

Westlake, vol. 2, p. 291.

So long however as resistance by a neutral merchantman to search, and even sailing with instructions to make such resistance, is held in England a cause for condemning both her and her cargo, sailing under neutral convoy, whether of the merchantman's own or of any other neutral state, must carry the same consequence, because it is thereby sought to profit by the convoying ship's unlawful employment of force. Whether a neutral merchantman incurs condemnation by attaching herself to a war fleet or ship of the enemy, thereby resorting to what is called belligerent convoy, is a question on which the British and United States prize courts have differed. The former decide in the affirmative, on the ground that by so doing she seeks to profit by the enemy's employment of force. In the United States the negative has been held, on the ground that the enemy's force of which advantage is sought to be taken is lawful. Each answer must be and is given in the same sense in the case of a neutral cargo embarked in an armed ship of the enemy, but the British court has held that neutral cargo does not suffer for being embarked in an enemy private ship which makes resistance.

Westlake, vol. 2, pp. 301, 302.

They [merchantmen] are bound to submit to search from a lawfully commissioned belligerent cruiser. Resistance to it will bring down certain capture and condemnation upon a neutral ship otherwise innocent. \* \* \* A neutral merchantman violates International Law if it makes any attempt to repel belligerent search by force of arms. Success may save it for the moment, but not for long. An international question will be raised between its country and the injured belligerent; and, unless its government wishes to provoke complications, some kind of punishment will fall upon its owners for its unlawful proceeding.

Lawrence, p. 469.

#### Conflict in practice as to condemnation of cargo.

If a neutral merchantman resists visit or search, she is at once captured, and may be confiscated. The question as to whether the vessel only, or also her cargo, could be confiscated for resistance has hitherto been controversial. According to British and American

theory and practice, the cargo as well as the vessel was liable to confiscation. But Continental writers emphatically argued against this and maintained that the vessel only was liable to confiscation.

Oppenheim, vol. 2, p. 540.

#### What constitutes resistance.

According to the practice hitherto prevailing, and also according to the Declaration of London, a mere attempt on the part of a neutral merchantman to escape visitation does not in itself constitute resistance. Such vessel may be chased and compelled by force to bring to, and she can not complain if, in the endeavor forcibly to compel her to bring to, she is damaged or accidentally sunk. If, after the vessel has been compelled to bring to, visit and search show her to be innocent, she must be allowed to proceed on her course.

Oppenheim, vol. 2, p. 541.

#### What constitutes forcible resistance.

Resistance to be penal must be *forcible* resistance. It constitutes resistance, therefore, if a vessel applies force in resisting any legitimate action by the belligerent cruiser which requires her to stop and to be visited and searched. The term *forcible resistance* is not defined in detail by article 63 of the Declaration of London. It is, consequently, not certain whether the actual application of force only, or also the refusal, on the part of the master, to show the ship papers or to open locked parts of the vessel or locked boxes, and similar acts, constitutes forcible resistance. The International Prize Court, if established, would have to develop a practice which would decide these points.

Wheaton excepted, all writers would seem to agree that the fact of neutral merchantmen sailing under a convoy of enemy men-of-war is equivalent to forcible resistance on their part, whether they themselves intend to resist by force or not. But the Government of the United States of America in 1810 contested this principle. In that year, during war between Great Britain and Denmark, many American vessels sailing from Russia used to seek protection under the convoy of British men-of-war, whereupon Denmark declared all such American vessels to be good and lawful prizes. Several were captured without making any resistance whatever, and were condemned by Danish Prize Courts. The United States protested, and claimed indemnities from Denmark, and in 1830 a treaty between the parties was signed at Copenhagen, according to which Denmark had to pay 650,000 dollars as indemnity. But in article 5 of this treaty the parties "expressly declare that the present convention is only applicable to the cases therein mentioned, and, having no other object, may never hereafter be invoked by one party or the other as a precedent or a rule for the future."

Article 63 of the Declaration of London does not—as was pointed out above in Sec. 423—define the term forcible resistance, but it is to be expected that the practice of the International Prize Court would consider the sailing under enemy convoy equivalent to forcible resistance.

Since Great Britain did not, before agreeing to the Declaration of London, recognize the right of convoy and had always insisted upon the right of visitation to be exercised over neutral merchantmen sail-

ing under the convoy of neutral men-of-war, the question has arisen as to whether such merchantmen are considered resisting visitation in case the convoying men-of-war only, and not the convoyed vessels themselves, offer resistance. British practice has answered the question in the affirmative. The rule was laid down in 1799 and in 1804 by Sir William Scott in the cases of Swedish vessels captured while sailing under the convoy of a Swedish man-of-war.

Since Great Britain \* \* \* has abandoned her opposition to the right of convoy and has agreed to articles 61 and 62 of the Declaration of London which lay down rules concerning the matter, the resistance by a neutral convoy to visitation may not, under ordinary circumstances, be considered to be resistance on the part of the convoyed neutral merchantman. If, however, the commander of a convoy, after having refused to give the written information mentioned in article 61 or to allow the investigation mentioned in article 62, forcibly resists visitation of the convoyed merchantmen by a belligerent cruiser, the question as to whether resistance by a convoy is equivalent to resistance by a convoyed vessel, may even under the Declaration of London arise.

Oppenheim, vol. 2, pp. 541-543.

#### **Rescue—Effect of, terminated at end of voyage.**

It was held by the United States Attorney General in 1838 that if a vessel, after escaping from her captors, terminates her voyage in safety, her liability to condemnation for the escape ceases.

3 Op. Atty. Gen., 377.

Any vessel is also liable to Detention, irrespectively of her national character, or the trade in which she is engaged, for:—

- (1.) Resistance to Visit or Search.
- (2.) Sailing under Neutral Convoy which resists.
- (3.) Sailing under Enemy Convoy.

Holland, p. 3.

The Commander should detain any Vessel which forcibly resists Visit or Search.

A mere attempt at escape is, in itself, no ground for Detention, though the Commander will not be liable for injury which he may cause to the Vessel, or her Crew, in forcibly preventing her escape.

The Penalty for Resistance by the Master of a Neutral Vessel, is the confiscation of the Vessel and the Neutral cargo. Resistance by the Master of an Enemy's private ship does not forfeit a Neutral cargo, which will, however, be condemned if found on board an armed Ship of the Enemy.

Any resistance made by a Neutral Convoying Ship to the lawful Visit and Search of a Vessel under her escort, will justify the Detention both of the Convoying Ship and of all Vessels convoyed by her.

If, upon the Visit and Search of a Vessel under Neutral Convoy, it shall appear that the Master set sail with instructions to make an armed resistance to Search, the Vessel should be detained.

Vessels under Enemy Convoy are, from that circumstance alone, liable to Detention.

Holland, pp. 44 and 45.

Merchant-vessels of a neutral nationality are liable to confiscation as prizes in the following cases:—

\* \* \* \* \*

(3) When such vessels resist by force of arms stoppage, examination, or seizure; \* \* \*

Russian Regulations, 1895, Article 11.

Irrespective of the character of her cargo, or her purported destination, a neutral vessel should be seized if she:

\* \* \* \* \*

(2) Resists search with violence.

\* \* \* \* \*

U. S. Naval War Code, 1900, Article 33.

A ship which resists visit or search, and that portion of her cargo which belongs to her owner, shall be condemned.

Japanese Regulations, 1904, Article 48.

#### Hostile convoy.

A ship sailing under convoy of a ship of war of the hostile state, and her cargo, shall be condemned.

Japanese Regulations, 1904, Article 49.

A neutral ship is to be treated as an enemy ship further when it—

\* \* \* \* \*

(b) forcibly resists the measures of the law of prize; against such ship force of arms is to be employed until resistance ceases; mere attempt to escape does not constitute forcible resistance.

German Prize Rules, 1909, Article 16.

#### Treatment of crew and passengers of ship captured because of resistance.

If a ship is captured under 16 b, (resistance) \* \* \* those persons who without being enrolled in the enemy forces have taken part in the hostilities or have exerted forcible resistance, may be dealt with according to the customs of war. The other persons of the crew will be made prisoners of war.

German Prize Rules, 1909, Article 99.

Section 102, French Naval Instructions, 1912, is substantially identical with article 63, Declaration of London.

Article 63, Declaration of London, is substantially identical with section 17, Austro-Hungarian Manual, 1913.

#### Forcible resistance of "armed" merchant vessel.

If an armed merchant ship of the enemy makes armed resistance to measures of the right of prize, such resistance is to be broken with all means. The responsibility for any damages which the ship, cargo and passengers may thereby suffer rests with the enemy government. The crew are to be treated as prisoners of war. The passengers are to be released, except when they have demonstrably taken part in the resistance. In the latter case, the procedure extraordinary to the laws of war is to be employed against them.

Orders of the Chief of the Admiral Staff of the German Navy, June 22, 1914, Article 2.

Neutral nation will not aid belligerent in obtaining possession of prizes.

"In reference to your letter of the 2d February last, I soon after took occasion to intimate to you what appeared to be the President's way of thinking on the subject. I have now the honor to state to you that while, by the law of nations, the right of a belligerent power to capture and detain the merchant vessels of neutrals, on just suspicion of having on board enemy's property, or of carrying to such enemy any of the articles which are contraband of war, is unquestionable, no precedent is recollected, nor does any reason occur which should require the neutral to exert its power in aid of the right of the belligerent nation in such captures and detentions. It is conceived that, after warning its citizens or subjects of the legal consequences of carrying enemy's property or contraband goods, nothing can be demanded of the sovereign of the neutral nation but to remain passive. If, however, in the present case, the British captors of the brigantine *Experience*, Hewit, master; the ship *Lucy*, James Conolly, master, and the brigantine *Fair Columbia*, Edward Carey, master, have any right to the possession of those American vessels or their cargoes, in consequence of their capture and detention, but which you state to have been rescued by their masters from the captors, and carried into ports of the United States, the question is of a nature cognizable before the tribunals of justice, which are opened to hear the captors' complaints; and the proper officer will execute their decrees."

Mr. Pickering, Secretary of State, to Mr. Liston, British minister, May 3, 1800, Moore's Digest, Vol. VII, pp. 501, 502.

"If a *neutral* master," says Sir W. Scott, "attempts a rescue, or to withdraw himself from search, he violates a duty which is imposed upon him by the law of nations, to submit to search, and to come in for inquiry as to the property of the ship or cargo, and if he violates this obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the whole property intrusted to his care, and thus fraudulently attempted to be withdrawn from the operation of the rights of war."

*The Catherine Elizabeth*, Robinson's Adm. Rep., V, 232, quoted with apparent approval, Dana's Wheaton, pp. 696, 697.

What constitutes resistance on the part of a convoying ship-of-war.

*The "Elsabe," 4 C. Rob., 409.*—This was the case of a Swedish man-of-war convoying merchant vessels, under orders to resist search. She fell in with a superior force of British vessels, and although she threatened to resist search and cleared for action, finally yielded to search, presumably on account of the superior force against her which would have rendered forcible resistance hopeless.

The merchant vessels were held to be subject to condemnation on the ground of resistance.

Rescue, following "illegal" capture.

*Miller v. The "Resolution," 2 Dall., 1.*—In this case it was held that a neutral may pursue and recover his property *illegally* captured, anywhere and at any time, until it is condemned as prize, by a court of competent jurisdiction.

*Maley v. Shattuck*, 3 *Cranch*, 457, 488.—The court, by Chief Justice Marshall, said: "It is well known that a vessel libeled as enemy's property is condemned as prize if she act in such a manner as to forfeit the protection to which she is entitled by her neutral character. If, for example, a search be resisted, or an attempt be made to enter a blockaded port, the laws of war, as exercised by belligerents, authorize a condemnation as enemy's property, however clearly it may be proved that the vessel is in truth the vessel of a friend."

**Rescue by crew unlawful.**

*Brig "Short Staple" v. United States*, 9 *Cranch*, 55.—In this case it was held that the crew of a captured vessel, in charge of a prize crew of inferior strength, are not bound to attempt to rescue, since such attempt would in case of recapture expose the vessel, though otherwise innocent, to condemnation.

*The "Nereide,"* 9 *Cranch*, 388.—In this case a neutral chartered an armed vessel of the enemy to carry his cargo and sailed himself on the vessel, which carried also cargo belonging to others. It appeared that the vessel remained under the direction of the owner and that the neutral in question in no way participated in the command of her.

Held that the forcible resistance which the vessel made to visitation and search did not subject the cargo of this neutral to condemnation.

See also *The Atalanta*, 3 *Wheaton*, 409.

**Sailing under hostile convoy constitutes such resistance as renders a neutral vessel subject to condemnation.**

*The "Nancy,"* 27 *Ct. Cl.*, 99.—The court said: "The question whether a neutral vessel laden with a neutral cargo is liable to condemnation if captured under enemy convoy has never been directly determined; but on a review of the cases and elementary writers, it is now held that if captured when actually and voluntarily under the protection of an enemy she is liable."

See also *The Sea Nymph*, 36 *Ct. Cl.*, 369, and *The Atalanta*, 3 *Wheaton*, 409.

If however before capture, the neutral vessel has voluntarily or involuntarily separated from the convoy, the fact that she was previously convoyed does not render her subject to condemnation.—*The Ship "Galen,"* 37 *Ct. Cl.*, 89.

**Rescue by crew unlawful.**

*The "Mary,"* 37 *Ct. Cl.*, 33.—In this case it was held that the right of search carries with it the correlative duty of submitting to search, and hence, that where a vessel has been seized by a belligerent and is being sent in for adjudication, her rescue by her master and crew is unlawful.

In the following cases, the United States Court of Claims held claimants to be disentitled to indemnity on the ground of forcible resistance to visitation and search:

*The Ship Rose*, 36 *Ct. Cl.*, 290;

*The Ship Amazon*, *id.*, 378;

*The Schooner Jane*, 37 *id.*, 24;

*The Schooner Endeavor*, 44 *id.*, 242.

What constitutes forcible resistance.

*The "Hipsang," Russian and Japanese Prize Cases, vol. 1, p. 21.*—In this case a British merchant vessel when overhauled by a Russian cruiser, attempted to ram the latter, and was therefore sunk by a torpedo.

Held that the sinking was justifiable.

#### VISIT AND SEARCH.

If on producing the said certificates it be discovered that the vessel carries some of the goods which are declared to be prohibited or contraband, and which are consigned to an enemy's port, it shall not however be lawful to break up the hatches of such ships, nor to open any chests, coffers, packs, casks, or vessels, nor to remove or displace the smallest part of the merchandizes, until the cargo has been landed in the presence of officers appointed for the purpose, and until an inventory thereof has been taken.

Treaty of Amity and Commerce concluded between the United States and Sweden April 3, 1783, Article XIII.

And to prevent entirely all disorder and violence in such cases, it is stipulated that, when the vessels of the neutral party, sailing without convoy, shall be met by any vessels of war, public or private, of the other party, such vessel of war shall not send more than two or three men in their boat on board the said neutral vessel to examine her passports and documents. And all persons belonging to any vessel of war, public or private, who shall molest or insult in any manner whatever, the people, vessels, or effects of the other party, shall be responsible in their persons and property for damages and interest, sufficient security for which shall be given by all commanders of private armed vessels before they are commissioned.

Treaty of Amity and Commerce concluded between the United States and Prussia, July 11, 1799, Article XV.

If either of the parties shall be at war, and shall meet a vessel at sea belonging to the other, it is agreed, that if an examination is to be made, it shall be done by sending a boat with two or three men only; and if any gun shall be fired, and injury done, without reason, the offending party shall make good all damages.

Treaty of Peace and Friendship, concluded between the United States and Morocco, September 16, 1836, Article V.

In order to prevent all kind of disorder in the visiting and examination of the ships and cargoes of both the contracting parties on the high seas, they have agreed mutually that whenever a national vessel of war, public or private, shall meet with a neutral of the other contracting party, the first shall remain out of cannon shot, unless in stress of weather, and may send its boat with two or three men only, in order to execute the said examination of the papers concerning the ownership and cargo of the vessel, without causing the least extortion, violence or ill-treatment, for which the commanders of said armed ships shall be responsible with their persons and property; for which purpose the commanders of private armed vessels shall,

before receiving their commissions, give sufficient security to answer for all the damages they may commit. And it is expressly agreed that the neutral party shall in no case be required to go on board the examining vessel for the purpose of exhibiting her papers, or for any other purpose whatever.

Treaty of Peace, Amity, Navigation, and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XXI.

In order to prevent all kinds of disorder in the visiting and examination of the ships and cargoes of both the contracting parties on the high seas, they mutually agree that whenever a vessel of war shall meet with a neutral of the other contracting party, the first shall remain at a convenient distance, and may send its boats with two or three men only; in order to execute the said examination of the papers concerning the ownership and cargo of the vessel, without causing the least extortion, violence or ill-treatment for which the commanders of the said armed ships shall be responsible with their persons and property; for which purpose the commanders of private armed vessels shall, before receiving their commissions, give sufficient security to answer for all the damages they may commit; and it is expressly agreed that the neutral party shall in no case be required to go on board the examining vessel for the purpose of exhibiting his papers, or for any other purpose whatever.

Treaty of Peace, Friendship, Commerce and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XXI.

In order to prevent all kinds of disorder in the visiting and examination of the ships and cargoes of both the contracting parties on the high seas, they have agreed, mutually, that whenever a vessel of war shall meet with a vessel not of war of the other contracting party, the first shall remain at a convenient distance, and may send its boat, with two or three men only, in order to execute the said examination of the papers, concerning the ownership and cargo of the vessel, without causing the least extortion, violence, or ill-treatment; and it is expressly agreed that the unarmed party shall in no case be required to go on board the examining vessel for the purpose of exhibiting his papers, or for any other purpose whatever.

In order effectually to provide for the security of the citizens and subjects of the contracting parties, it is agreed between them that all commanders of ships of war of each party, respectively, shall be strictly enjoined to forbear from doing any damage to or committing any outrage against the citizens or subjects of the other, or against their vessels or property; and if the said commanders shall act contrary to this stipulation, they shall be severely punished, and made answerable in their persons and estates for the satisfaction and reparation of said damages, of whatever nature they may be.

Treaty of Commerce and Navigation concluded between the United States and Italy, February 26, 1871, Articles XVIII and XX.

The war vessels and military forces of belligerent States are alone authorized to exercise the law of prize, that is to say, the stopping, visit, search and seizure of merchant vessels during a naval war.

Institute, 1882, p. 46.



**Stopping.**

In the cases provided for in these regulations war vessels of a belligerent State are authorized to stop any merchant vessel or private vessel which they may meet in the waters of their State, or on the high seas, and elsewhere than in neutral waters or waters withdrawn from acts of war.

The war vessel of the belligerent, in order to invite the merchant vessel to stop, shall fire a shot from a cannon, as a summons, using either blank shot, or powder only. Before, or at the same time, the war vessel shall raise its flag, and in the night time shall place a lantern above it. Upon this signal the vessel which has been stopped shall raise its flag and heave to to await the visit. The war vessel shall then send to the vessel which has been stopped a boat manned by an officer accompanied by a sufficient number of men, of whom but two or three, with the officer, shall board the vessel which has been stopped.

The vessel which has been stopped can never be required to send its master or any person whatever on board the war vessel to show his papers or for any other purpose.

The merchant vessel is obliged to stop; it is forbidden to continue on its course. If it does continue the war vessel has the right to pursue it and stop it by force.

Institute, 1882, pp. 47, 48.

The right of visit is exercised in belligerent waters, so far as they are not protected from acts of war by treaty, and on the high seas; it is exercised as to merchant vessels, but not as to war vessels of a neutral State, or as to other vessels ostensibly belonging to such State, or as to neutral merchant vessels convoyed by a war vessel of their State.

The right of visit is exercised for the purpose of either verifying the nationality of a vessel which has been stopped, or for ascertaining whether the vessel is engaged in transportation which has been forbidden, or for ascertaining whether there has been a violation of a blockade.

\* \* \* \* \*

When the vessel to be visited is a mail boat, it shall not be visited if the officer of the government whose flag it flies, who is on board the ship declares in writing that the mail ship is carrying neither dispatches nor troops for the enemy, nor contraband of war for the account of, or destined to, the enemy.

Visit, to which every vessel not exempted therefrom by the provisions of Articles 16 and 17, should submit, begins with an examination of the papers of the vessel which has been stopped. If these papers are found to be in proper form or if there is nothing to arouse suspicion, the vessel which has been stopped may continue its voyage. Neutral vessels destined for scientific expeditions may also continue their voyages provided they observe the laws of neutrality.

Institute, 1882, pp. 48, 49.

**Grounds for suspicion.**

If the vessel's papers are not in proper form, or if upon the visit being made there appears ground for suspicion, as provided in the following article, the officer who makes the visit is authorized to proceed

to search the vessel. The vessel may not oppose this; if it nevertheless does so, search may be made by the use of force.

There is ground for suspicion in the following cases:

1. When the vessel which has been stopped does not heave to at the invitation of the war vessel;
2. When the vessel which has been stopped opposes a visit to the secret places supposed to conceal the ship's papers or contraband of war;
3. When there are two sets of papers, or false, or altered, or secret papers, or insufficient papers, or no papers at all;
4. When the papers have been thrown into the sea or destroyed in any other fashion, especially if these acts have occurred after the vessel could discover the approach of the war vessel;
5. When the vessel which has been stopped is sailing under a false flag.

Persons charged with making the search can not open or break into closets, lodgings, trunks, cash boxes, casks, half casks, or other receptacles which may contain part of the cargo, nor arbitrarily examine articles forming part of the cargo which are spread about openly on the vessel.

In the cases where there are grounds for suspicion as mentioned in Article 20, if there is no resistance to the search the officer who proceeds to make it should have the containers opened by the master and make the examination of the cargo openly on the vessel in the presence of the master.

Institute, 1882, pp. 49, 50.

#### **Effect of armistice upon rights of visit and capture.**

##### **An armistice suspends military operations.**

\*            \*            \*            \*            \*            \*

The exercise of the right of visit continues to be permitted. The right of capture ceases except in cases where it exists with regard to neutral vessels.

Institute, 1913, p. 195.

In order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to ascertain the real as well as assumed character of all vessels on the high seas, the law of nations arms them with the practical power of visitation and search. The duty of self-preservation gives to belligerent nations this right. It is founded upon necessity, and is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conceded by treaty. All writers upon the law of nations, and the highest authorities, acknowledged the right in time of war as resting on sound principles of public jurisprudence, and upon the institutes and practice of all great maritime powers. And if, upon making the search, the vessel be found employed in contraband trade, or in carrying enemy's property, or troops, or despatches, she is liable to be taken and brought in for adjudication, before a prize court.

Neutral nations have frequently been disposed to question and resist the exercise of this right. This was particularly the case with the Baltic confederacy during the American war, and with the convention of the Baltic Powers, in 1801. The right of search was denied, and the flag of the state was declared to be a substitute for all

documentary and other proof, and to exclude all right of search. Those powers armed for the purpose of defending their neutral pretensions; and England did not hesitate to consider it as an attempt to introduce, by force, a new code of maritime law inconsistent with her belligerent rights, and hostile to her interests, and one which would go to extinguish the right of maritime capture. The attempt was speedily frustrated and abandoned, and the right of search has, since that time, been considered incontrovertible.

\* \* \* \* \*

This right of search is confined to private merchant vessels, and does not apply to public ships of war. Their immunity from the exercise of any civil or criminal jurisdiction but that of the sovereign power to which they belong, is uniformly asserted, claimed, and conceded. A contrary doctrine is not to be found in any jurist or writer on the law of nations, or admitted in any treaty; and every act to the contrary has been promptly met and condemned.

The exercise of the right of visitation and search must be conducted with due care and regard to the rights and safety of the vessels.

Kent, vol. 1, pp. 159-165.

The right of visitation and search of neutral vessels at sea is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade. Even if the right of capturing enemy's property be ever so strictly limited, and the rule of *free ships free goods* be adopted, the right of visitation and search is essential, in order to determine whether the ships themselves are neutral, and documented as such, according to the law of nations and treaties; for, as Bynkershoek observes, "It is lawful to detain a neutral vessel, in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral." Indeed it seems that the practice of maritime captures could not exist without it. Accordingly the text writers generally concur in recognizing the existence of this right.

Dana's Wheaton, pp. 688-690.

Although it is universally conceded that the vessels of one state cannot search the duly documented vessel of another state, in time of peace, and although the right of visitation, if it exists at all, (and since its recent renouncement by Great Britain, probably no respectable power will claim that it does exist, except in cases of piracy,) must be limited, in time of peace, to the sole purpose of ascertaining the national character of a suspected vessel, it is, nevertheless, the incontestable right of the lawfully commissioned cruisers of every belligerent, *in time of war*, to visit and search, on the high seas, the merchant ships of every nation, whatever may be their character, cargoes, or destination. This right of visitation and search, in time of war, springs directly from the right of maritime capture; for without the former we must abandon the latter, or so extend it as to authorize the indiscriminate seizure of all merchant vessels that may be found upon the ocean; until they are visited and searched, it would be impossible to know whether or not they are liable to capture, either from the ownership of the vessel, the nature of the

cargo, or the character of the voyage. It will be shown hereafter, that while nearly all are agreed as to the general right of visitation and search, there is great diversity of opinion with respect to the circumstances under which a neutral vessel is liable to search, and with respect to the character and extent of the search which the belligerent is authorized to make.

\* \* \* \* \*

But, although it is the duty of the neutral to submit to the lawful search of the belligerent, and to all acts that are necessary to accomplish that object, it by no means follows that the belligerent is subject to no restraints in the exercise of this right. It is not sufficient that the right is lawful, it must be exercised in a lawful manner. The right is limited to such acts as are necessary to a thorough examination into the real character of the vessel, her cargo, and voyage, and all acts that transcend the limits of this necessity are unlawful. For an improper detention of the vessel, or any unnecessary, and therefore unlawful, violence to the master or crew, the belligerent court of admiralty is pretty certain to award full compensation in damages; and if this should be denied to the neutral, his own government may demand and enforce the redress of his wrongs. "Whatever," says Phillimore, "may be the injury that casually results to an individual from the act of another, while pursuing the reasonable exercise of an established right, it is his misfortune. The law pronounces it *damnum absque injuria*, and the individual from whose act it proceeds is liable neither at law, nor in the forum of conscience. The principal right necessarily carries with it, also, all the means essential to its exercise. A vessel must be pursued, in order to be detained for examination. And if, in the pursuit, she has been in any way injured, (e. g., dismasted, upset, stranded, or even run on shore and lost,) it would be an unfortunate case, but the pursuing vessel would be acquitted." The usual mode, adopted by most of the maritime powers of Europe, of summoning a neutral to undergo visitation, is the firing of a cannon on the part of the belligerent. This is called by the French *semonce*, *coup d'assurance*, and by the English, *affirming gun*. It is, undoubtedly, the duty of the neutral to obey such a summons, but there is no positive obligation on the belligerent to fire such an *affirming gun*, for its use is by no means universal. Moreover, any other method, as hailing by signals, etc., of summoning a neutral to submit to an examination, may be equally as effective and binding as the *affirmative gun*, if the summons is actually communicated to, and understood by, the neutral. The means used are not essential, but the fact of a summons actually communicated, is necessary to acquit the visiting vessels of all damages, which may result to the neutral disobeying it.

Halleck, pp. 606, 610.

In order to enforce the right of preventing neutrals from conveying hostile or contraband goods on their ships, and from breaking blockade, it is necessary that the belligerents should be invested with the right of search or visit. By this is intended the right to stop a neutral vessel on the high seas, to go on board of her, to examine her papers, and, it may be, even her cargo,—in short, to ascertain by personal inspection that she is not engaged in the infraction of

any of the rights above enumerated. [For as Lord Stowell said, in the case of the Swedish convoy, "a merchant ship is liable to search, whatever may be her character, destination, or cargo; for until you have searched her you cannot certainly tell what her character, destination, and cargo are. The right to capture carries the right to search with it."]

The right of search is by its nature confined within narrow limits, for it is merely a method of ascertaining that certain specific violations of right are not taking place, and would otherwise be a great violation, itself, of the freedom of passage on the common pathway of nations. *In the first place*, it is *only a war right*. \* \* \* *In the second place*, it is applicable to merchant ships alone. Vessels of war, pertaining to the neutral, are exempt from its exercise, both because they are not wont to convey goods, and because they are, as a part of the power of the state, entitled to confidence and respect. If a neutral state allowed or required its armed vessels to engage in an unlawful trade, the remedy would have to be applied to the state itself. To all this we must add that a vessel in ignorance of the public character of another, for instance, suspecting it to be a piratical ship, may without guilt require it to lie to, but the moment the mistake is discovered, all proceedings must cease. *In the third place*, the right of search must be exerted in such a way as to attain its object, and nothing more. Any injury done to the neutral vessel or to its cargo, any oppressive or insulting conduct during the search, may be good ground for a suit in the court to which the cruiser is amenable, or even for interference on the part of the neutral state to which the vessel belongs. *In the fourth place*, it may be an act of self-defense in extreme cases, or what is equivalent to a war-right against unlawful expeditions by parties not constituting a state.

Woolsey, pp. 357. 358.

Visit is the means by which a belligerent ascertains whether a mercantile vessel carrying the flag of a neutral state is in fact neutral, and by which he examines whether she has or has not been guilty of any breach of the law. By capture, he gives effect to his rights over neutral property at sea which has become noxious to him in any of the ways indicated in the preceding chapters, and puts himself in a position to inflict the appropriate penalty.

As the right possessed by the belligerent of controlling intercourse between neutrals and his enemy is an incident of war, and as war can only be waged by or under the authority of a state, the rights of visit and capture must be exercised by vessels provided with a commission from their sovereign.

All neutral mercantile vessels are subject to visit upon the high seas, and within the territorial waters of the belligerent or his enemy. On the other hand, as the pretension to search vessels of war, which formed a grave matter of contest in the early part of the century, can no longer be seriously urged, private vessels of the neutral state are the only subjects of the belligerent privilege.

Hall, pp. 746, 747.

The exercise of the right of visit is necessarily attended with formalities, the regulation of which has been attempted in a large number of treaties without any definite arrangement as to the details having received universal assent. Usually the visiting ship, on arriving within reasonable distance, hoists its colours and fires a gun, called the semonce or affirming gun, by which the neutral vessel is warned to bring to, but the ceremony, though customary, is not thought to be essential either in English or American practice. The belligerent vessel then also brings to at a distance which, in the absence of treaties, is unfixed by custom, but which has been often settled with needless precision. The natural distrust of armed vessels which was entertained, when privateers of not always irreproachable conduct were employed in every war, and when pirates were not unknown, dictated stipulations enjoining on the cruiser to remain beyond cannon shot; but the reason for so inconvenient a regulation has disappeared, and the modern treaties which repeat the provision, as well as those which permit approach to half range, are alike open to the criticism of M. Ortolan, that "they have not been drawn by sailors." The visit itself is effected by sending an officer on board the merchantman, who in the first instance examines the documents by which the character of the vessel, the nature of her cargo, and the ports from and to which she is sailing, are shown. According to the English practice these documents ought generally to be,—

1. The register, specifying the owner, name of ship, size, and other particulars necessary for identification, and to vouch the nationality of the vessel.

2. The passport (sea letter) issued by the neutral state.

3. The muster roll, containing the names, &c. of the crew.

4. The log-book.

5. The charter party, or statement of the contract under which the ship is let for the current voyage.

6. Invoices containing the particulars of the cargo.

7. The duplicate of the bill of lading, or acknowledgement from the master of the receipt of the goods specified therein, and promise to deliver them to the consignee or his order. And the information contained in these papers is in the main required by the practice of other nations.

If the inspection of the documents reveals no ground of suspicion, and the visiting officer has no serious anterior reason for suspecting fraud, the vessel is allowed to continue its voyage without further investigation; if otherwise, it is subjected to an examination of such minuteness as may be necessary.

Hall, pp. 754-756.

We have discussed the rights of capture possessed by belligerents as far as it is possible to do so without introducing questions connected with neutrality. But in order that belligerents may be able to exercise these rights, it is necessary that they should possess what we may call the ancillary right to stop, detain, and overhaul merchantmen, in order to discover whether the ships themselves or the goods they carry are liable to seizure and detention. This is called indifferently the *right of search* or the *right of visit and search*. Apart from treaty, there is no right of visit without a right to examine the papers of the ship visited and rummage among its cargo if

they are not satisfactory, and no right of search without a right to detain the vessel searched if a thorough examination of it reveals circumstances of grave suspicion.

All jurists agree that the right of search belongs to belligerents, and to belligerents only, except in the rare cases when it is applied to suspected pirates under the common law of nations, and to suspected slaves under the provisions of a treaty. It is, as Judge Story said in the case of the *Marianna Flora*, "allowed by the general consent of nations in time of war and limited to those occasions"; and his statement may be regarded as true, since the abandonment by Great Britain in 1858 of her claim to a general right of visit in time of peace in order to discover the real nationality of vessels suspected of being engaged in the slave trade. The exceptions introduced by convention are themselves proof that nothing but express agreement can justify search in time of peace, unless it is directed against pirates. The right can be exercised on merchantmen only. \* \* \*

But though neutral ships of commerce must submit to belligerent search, neutral men-of-war are free from it. Any attempt to enforce it against them would be a gross outrage. So long ago as the beginning of the last century the British Government disavowed the act of Admiral Berkeley in ordering the vessels of his squadron to search the American ship-of-war *Chesapeake* for deserters from the royal navy. In consequence of this order a conflict took place between the *Chesapeake* and the *Leopard*, and after the surrender of the former, four seamen were taken out of her. These unjustifiable and high-handed proceedings nearly led to a war between the two countries in 1807. It was averted by the disavowal of the British Government, and its tender of indemnity to those American citizens who were injured in the action and the families of those who were slain; but unfortunately the dispute as to the right of impressment still went on, and became the chief cause of the War of 1812.

A belligerent vessel may chase under false colors or without colors of any kind; but before it commences the actual work of visit and search it must hoist its country's flag. If hailing is impossible, or if the suspected vessel takes no notice of it, the chasing cruiser may signal her to bring to by using blank cartridge, and then, if necessary, sending a shot across her bows. This is called firing the *semonce* or affirming gun. Any other signal likely to be understood is equally lawful, but some unmistakable summons is necessary. Not till it has been given and disregarded is the use of force allowed. Into the incidents of a conflict we need not go. They have nothing in common with the procedure of a search. Assuming that the summons of the belligerent cruiser is obeyed, the next step taken by her commander is to send an officer or officers in uniform on board the vessel to be searched. The visiting officer should question the master of the vessel and examine her papers. If any circumstances of suspicion are revealed by his examination, but not otherwise, he is at liberty to call his boat's crew on board and order them to make a thorough search of the vessel. Should the search confirm the suspicions, the commander of the cruiser may take possession of the ship, secure her papers, and detain her master and crew. Throughout his proceedings he is bound to use courtesy and consideration, and to carry on the search with as little disturbance as possible of the interior economy or navigation of the suspected vessel. \* \* \*

The object of the procedure we have just sketched is to secure belligerents against evasion of their right of capture, and at the same time protect neutrals from vexatious interference with their sea-borne commerce. The further limitations which some writers have striven to impose on the action of searching officers have not been accepted by the great body of maritime states, and find no place in modern International Law. But it is different with restrictions on the right itself as distinct from the mode of its enforcement. Even when neutral vessels had not rendered themselves liable to detention and condemnation, they suffered so much annoyance and loss from belligerent search that their governments naturally endeavored to minimize the opportunities of subjecting them to it. Hence arose a persistent and in the end successful attempt to secure freedom from visit and search for neutral ships of commerce sailing under the escort of ships of war of their own nationality. Great Britain resisted for a long time a desire which gradually became universal. At last in the Declaration of London of 1909 she conceded the point at issue. We shall consider the matter under the head of Convoy when we deal with the Law of Neutrality. But the changed conditions of commerce have made further advances necessary. While the amount of mercantile tonnage at sea is increasing enormously with the growth of international trade, the number of ocean-going merchantmen afloat is actually decreasing. Huge cargo-boats are built, which carry thousands of tons of merchandise belonging to shippers of many nationalities. Craft such as these cannot be searched at sea in a few hours, as was the case with the much smaller vessels of fifty years ago. The belligerent must exercise his right to take them into one of his own ports, and there employ gangs of men to empty their spacious holds. This means long delay, and delay means ruinous loss to shippers. Even if nothing of a compromising character is found, and in the end the ship and cargo are released, a large fine will have been inflicted on innocent people. The Boer War afforded some cases in point. On December 29, 1899, the German mail steamer, *Bundesrath*, was brought into the port of Durban by a British cruiser on suspicion of carrying contraband of war and volunteers for the Boer army. She was searched for nine days, and then released on the ground that no contraband had been found. The *Herzog* went through a somewhat similar experience, but was released after detention in port for three days. The *General* remained six days at Aden, during which time twelve hundred tons of cargo were first removed and then replaced. All these vessels were bound for Lorenzo Marques, a neutral Portuguese port in Delagoa Bay, whence the Transvaal Government drew warlike supplies over the railway connecting it with their capital, Pretoria. The controversy which immediately arose between Great Britain and Germany was, therefore, complicated by references to the question of the soundness of the doctrine of continuous voyages, which we shall discuss in chapter vi of part IV. We are concerned now with the vast extension in modern times of the inconveniences and losses caused to neutrals by belligerent search. Great Britain did not exceed her strict legal right by one iota. The question whether the suspicions that caused her to detain the German steamers were correct was never threshed out in a prize court. But the mere preliminaries of a trial roused a storm of indignation in Germany, and seriously embittered the relations between the two



countries. The release of the vessels was effected by administrative order, and the British Government paid an indemnity of £20,000 for the injurious exercise of an undoubted right. It is clear from the bare recital of these facts that in any future naval struggle carried on by powerful maritime states the position of neutrals possessed of a great mercantile marine will be intolerable. The only way of escape is to modify the right of search to such an extent that belligerents may obtain reasonable assurance of the innocence of harmless cargoes, without inflicting on neutrals the ruinous and humiliating process of deviation to a belligerent port and a complete overhaul therein of all the vessels contains. The continuance of the existing state of things involves grave danger of a great extension of any naval war that may break out in the near future. It is worthy of consideration whether some system of official certificates could not be devised, whereby neutral vessels could carry, if they chose, satisfactory assurances that their passengers and cargoes consisted only of the persons and goods set forth and described in their papers. A visiting belligerent officer could then decide whether to effect a capture or not, without the need of a preliminary search.

Lawrence, pp. 468-474.

Right of visitation is the right of belligerents to visit and eventually search neutral merchantmen for the purpose of ascertaining whether these vessels really belong to the merchant marine of neutrals, and, if this is found to be the case, whether they are attempting to break a blockade, or carry contraband, or render unneutral service to the enemy. The right of visit and search was already mentioned in the *Consolato del Mare*, and although it has often been contested, its *raison d'être* is so obvious that it has long been universally recognised in practice. It is indeed the only means by which belligerents are able to ascertain whether neutral merchantmen intend to bring assistance to the enemy and to render him unneutral services.

The right of visit and search may be exercised by all warships of belligerents. But since it is a belligerent right, it may, of course, only be exercised after the outbreak and before the end of war. The right of visitation on the part of men-of-war of all nations in time of peace in a case of suspicion of piracy has nothing to do with the right of visit and search on the part of belligerents. And since an armistice does not bring war to an end, and since, on the other hand, the exercise of the right of visitation is not an act of warfare, this right may be exercised during the time of a partial as well as of a general armistice. The region where the right may be exercised is the maritime territorial belt of either belligerent, and, further, the Open Sea, but not the maritime territorial belt of neutrals. Whether the part of the Open Sea in which a belligerent man-of-war meets with a neutral merchantman is near or far away from that part of the world where hostilities are actually taking place makes no difference so long as there is suspicion against the vessel. The question as to whether the men-of-war of a belligerent may exercise the right of visitation in the maritime territorial belt of an ally is one between the latter and the belligerent exclusively, provided such an ally is already a belligerent.

During the nineteenth century it became universally recognised that neutral men-of-war are not objects of the right of visit and

search of belligerents. And the same is valid regarding public neutral vessels which sail in the service of armed forces, such as transport vessels, for instance. Doubt exists as to the position of public neutral vessels which do not sail in the service of armed forces, but sail for other purposes, as, for instance, mail-boats, belonging to a neutral State. It is asserted that, if commanded by an officer of the Navy, they must be treated in the same way as men-of-war, but that it is desirable to ask the commanders to give their word of honour assuring the absence of contraband and unneutral service.

Oppenheim, vol. 2, pp. 533-535.

There are no rules of International Law which lay down all the details of the formalities of the mode of visitation. A great many treaties regulate them as between the parties, and all maritime nations have given instructions to their men-of-war regarding these formalities. Thereby uniform formalities are practised with regard to many points, but regarding others the practice of the several States differs. \* \* \*

A man-of-war which wishes to visit a neutral vessel must stop her or make her bring to. Although the chasing of vessels may take place under false colours, the right colours must be shown when vessels are stopped. The order for stopping can be given by hailing or by firing one or two blank cartridges from the so-called affirming gun, and, if necessary, by firing a shot across the bows of the vessel. If nevertheless the vessel does not bring to, the man-of-war is justified in using force to compel her to bring to. Once the vessel has been brought to, the man-of-war also brings to, keeping a reasonable distance. With regard to this distance, treaties very often stipulate either the range of a cannon shot or half such width or even a range beyond a cannon shot; but all this is totally impracticable. The distance must vary according to the requirements of the case, and according to wind and weather.

The vessel, having been stopped or brought to, is visited by one or two officers sent in a boat from the man-of-war. These officers examine the papers of the vessel to ascertain her nationality, the character of her cargo and passengers, and, lastly, the ports from and to which she is sailing. Instead of visiting the merchantman and inspecting her papers on board, the practice is followed, by the men-of-war of some States, of summoning the master of the merchantman with his papers on board the former and examining the papers there.

If everything is found in order and there is no suspicion of fraud, the vessel is allowed to continue her course, a memorandum of the visit having been entered in her log-book. On the other hand, if the inspection of the papers shows that the vessel is carrying contraband or rendering unneutral service, or that she is for another reason liable to capture, she is at once seized. But it may be that, although ostensibly everything is in order, there is nevertheless grave suspicion of fraud against the vessel. In such case she may be searched.

Oppenheim, vol. 2, pp. 537-539.

Search is effected by one or two officers, and eventually a few men, in presence of the master of the vessel. Care must be taken not to damage the vessel or the cargo, and no force whatever must be

applied. No lock must be forcibly broken open by the search party, but the master is to be required to unlock it. If he fails to comply with the demand he is not to be forced thereto, since the master's refusal to assist the search in general, or that of a locked part of the vessel or of a locked box in particular, is at once sufficient cause for seizing the vessel. Search being completed, everything removed has to be replaced with care. If the search has satisfied the searching officers and dispelled all suspicion, a memorandum is entered in the log-book of the vessel, and she is allowed to continue her voyage. On the other hand, if search brought contraband or another cause for capture to light, the vessel is seized. But since search can never take place so thoroughly on the sea as in a harbour, it may be that, although search has disclosed no proof to bear out the suspicion, grave suspicion still remains. In such case she may be seized and brought into a port for the purpose of being searched there as thoroughly as possible. But the commander of a man-of-war seizing a vessel in such case must bear in mind that full indemnities must be paid to the vessel for loss of time and other losses sustained if finally she is found innocent. Therefore, after a search at sea has brought nothing to light against the vessel, seizure should take place only in case of grave suspicion.

Oppenheim, vol. 2, pp. 539, 540.

The powers with which the Commander of one of Her Majesty's Cruisers is invested for the purpose of making Lawful Prize in time of war are those of:—

Visit,  
Search,  
Detention (with a view to Adjudication).

Holland, p. 1.

These powers [of visit, search and detention] may be exercised over any Private Vessel, whatever may be her Nationality, but not over any Ship belonging to the Public Navy of a friendly Power.

Holland, p. 2.

The power of Visit should be exercised only over Vessels which the Commander of Her Majesty's Cruiser has some reason to believe are liable to Detention, either as being the property of Enemies, or as being engaged in a prohibited trade or service.

The Vessels thus liable to Detention are \* \* \* \*:

- I. Any Enemy Vessel, irrespectively of her destination or cargo.
- II. Any British Vessel, or Vessel of an Ally, trading with, or acting in the service of, the Enemy.
- III. Any Neutral Vessel engaged in:—
  - (1.) Carriage of Contraband.
  - (2.) Acting in the service of the Enemy.
  - (3.) Breach of Blockade.

Except in these three cases, to which, under certain circumstances, others may possibly be added by special instructions, Neutral Vessels are free to trade with the enemy.

Holland, pp. 2-3.

In exercising the right of Visit, the Commander should be careful to occasion to the Vessel no delay or deviation from her course that can be avoided, and generally to conduct the Visit in a manner as little vexatious as possible.

The Commander may chase, but under no circumstances may fire, under false colours.

The Commander should not in any case require a Boat to be sent from the Vessel, or any Person or Papers to be brought from her on board his Ship.

If the state of the wind and weather permit, the Commander should communicate his intention to Visit by hailing, and then cause his Ship to go ahead of the suspected Vessel, and drop a boat alongside of her.

If the state of the wind and weather render such a course impracticable, the Commander should require the Vessel to be brought to. For this purpose he should give warning by firing successively two blank guns, and then, if necessary, a shot across her bows; but before firing, the Commander, if he has chased under false colours or without showing his colours, should be careful to hoist the British Flag and Pendant.

If these measures fail to cause the Vessel to bring to, then, but not till then, the Commander will be justified in resorting to coercion.

When the Vessel has been brought to, the Commander should send a boat alongside of her.

A second Officer should (if convenient) accompany the Visiting Officer, and should be instructed to observe carefully everything that occurs during the Visit, in order that, if required, he may be able to give his testimony.

The Visiting Officer and the Officer by whom he is accompanied should be in proper Uniform, and the Boat should carry a British Flag.

The only persons who should in the first instance go on board the Vessel are the Visiting Officer and the Officer by whom he is accompanied: none of the Crew should be allowed to quit the boat, unless expressly ordered. If found necessary, they should be ordered on board.

If the Visiting Officer, upon boarding, is at once satisfied that the Vessel is not liable to Detention, he should immediately quit her.

If not so satisfied, he should demand, but with all proper courtesy, to see the Vessel's Papers. In case of refusal, he should insist upon their production: in the last resort he will be justified in adopting coercive measures, but it is important, so far as possible, to avoid any exercise of force.

The Visiting Officer should be careful to obtain the name of the Vessel correctly. He should not be content with taking it from the mouths of the Master and Crew, but should observe how the name is written in her Papers and painted on her stern and on her boats.

If after examining the Vessel's Papers the Visiting Officer is satisfied that she is not liable to Detention, he should immediately quit her.

Before quitting the Vessel, the Visiting Officer should ask the Master whether he has any complaint to make of the manner in which the Visit has been conducted, or on any other ground. If the

Master makes any complaint, the Visiting Officer should request him to specify the particulars in writing.

The Visiting Officer should enter on the Log-book of the Vessel a Memorandum of the Visit. The Memorandum should specify the date and place of the Visit, and the name of Her Majesty's Ship and of the Commander; and the Visiting Officer should sign the Memorandum, adding his rank in the Navy.

A similar Memorandum should be made on that document amongst the Vessel's Papers which may be supposed to determine her Nationality.

Immediately on his return to his Ship the Visiting Officer should draw up a statement of his proceedings, while the facts are fresh in his memory, specifying whether any complaint was made by the Master or any other person on board the Vessel, and, if so, what the complaint was. He should also deliver to the Commander any complaint which the Master may have made in writing, and the Commander should thereupon carefully investigate the case, and should lose no time in applying such remedy as circumstances may admit.

The Officer who accompanied the Visiting Officer should also draw up in detail and deliver to the Commander a statement of all the facts which he witnessed.

The Commander should see that a proper entry of all the necessary particulars is made in the Boarding-book, and also in the Log-book of the Ship. Both the Boarding-book and the Log-book should be signed by the Officers by whom the Visit was made.

The Commander should, by the first opportunity, forward a full Report of the Case, together with his own remarks thereon, to the Senior Officer on the Station; and a Duplicate thereof to the Secretary of the Admiralty.

Holland, pp. 61-64.

If, after an examination of the Vessel's Papers, the Visiting Officer is not satisfied that she is not liable to Detention, he should proceed to search her.

When the Search has been authorised, the Boat's Crew should be called on board to assist, and, if required, further assistance should be obtained from the Ship.

The Visiting Officer will also be justified in making inquiries from the Master and Crew; but he should abstain from all threats or intimidation.

During the Search, neither the Master nor any other person should be removed from the Vessel without his own consent.

Care should be taken to prevent any irregularity, or any damage to the Cargo.

If in the course of the Search the Visiting Officer is satisfied that the Vessel is not liable to detention, the Search should be immediately discontinued; every thing that has been removed should be replaced as quickly and carefully as possible, and the Vessel allowed to pursue her course without delay.

If the Visiting Officer finds on board any Ship-Papers relative to another Vessel already captured, but not adjudicated upon, he will take possession of them, and forward them to that Port to which such other Vessel has been sent in for Adjudication.

Before quitting the Vessel, the Visiting Officer should ask the Master whether he has any complaint to make of the manner in which the Search has been conducted, or on any other ground. If the Master makes any complaint the Visiting Officer should request him to specify the particulars in writing.

The Visiting Officer should enter on the Log-book of the Vessel a Memorandum of the Search. The Memorandum should specify the date and place of the search, and the name of Her Majesty's Ship and of the Commander; and the Visiting Officer should sign the Memorandum, adding his rank in the Navy.

A similar Memorandum should be made on that Document amongst the Vessel's Papers which may be supposed to determine her Nationality.

Immediately on his return to his Ship, the Visiting Officer should draw up a statement of his proceedings, while the facts are fresh in his memory, specifying whether any complaint was made by the Master or any other person on board the Vessel, and, if so, what the complaint was. He should also deliver to the Commander any Complaint which the Master may have made in writing, and the Commander should thereupon carefully investigate the case, and should lose no time in applying such remedy as circumstances may admit.

The Officer who accompanied the Visiting Officer should also draw up in detail and deliver to the Commander a statement of all the facts which he witnessed.

The Commander should see that a proper Entry of all the necessary particulars is made in the Boarding book, and also in the Log-book of the Ship. Both the Boarding-book and the Log-book should be signed by the Officers by whom the Search was made.

The Commander should, by the first opportunity, forward a full report of the Case, together with his own remarks thereon, to the Senior Officer on the Station, and a Duplicate thereof to the Secretary of the Admiralty.

Holland, pp. 65, 66, 67.

The belligerent right of search may be exercised without previous notice, upon all neutral vessels after the beginning of war, to determine their nationality, the character of their cargo, and the ports between which they are trading.

This right should be exercised with tact and consideration, and in strict conformity with treaty provisions, wherever they exist. The following directions are given, subject to any special treaty stipulations: After firing a blank charge, and causing the vessel to lie to, the cruiser should send a small boat, no larger than a whaleboat, with an officer to conduct the search. There may be arms in the boat, but the men should not wear them on their persons. The officer wearing only his side arms, and accompanied on board by not more than two men of his boat's crew, unarmed, should first examine the vessel's papers to ascertain her nationality and her ports of departure and destination. If she is neutral, and trading between neutral ports, the examination goes no further. If she is neutral, and bound to an enemy's port not blockaded, the papers which indicate the character of her cargo should be examined. If these show contraband of war,

the vessel should be seized: if not, she should be set free, unless, by reason of strong grounds of suspicion, a further search should seem to be requisite.

Instructions to United States Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 781.

The exercise of the right of search during war shall be confined to properly commissioned and authorized vessels of war.

The object of the visit or search of a vessel is:

- (1) To determine its nationality.
- (2) To ascertain whether contraband of war is on board.
- (3) To ascertain whether a breach of blockade is intended or has been committed.
- (4) To ascertain whether the vessel is engaged in any capacity in the service of the enemy.

The right of search must be exercised in strict conformity with treaty provisions existing between the United States and other States, and with proper consideration for the vessel boarded.

U. S. Naval War Code, 1900, Articles 30, 31.

The following mode of procedure, subject to any special treaty stipulations, is to be followed by the boarding vessel, whose colors must be displayed at the time:

The vessel is brought to by firing a gun with blank charge. If this is not sufficient to cause her to lie to, a shot is fired across the bows, and in case of flight or resistance force can be used to compel the vessel to surrender.

The boarding vessel should then send one of its smaller boats alongside, with an officer in charge, wearing side arms, to conduct the search. Arms may be carried in the boat, but not upon the persons of the men. When the officer goes on board of the vessel he may be accompanied by not more than two men, unarmed, and he should at first examine the vessel's papers to ascertain her nationality, the nature of the cargo, and the ports of departure and destination. If the papers show contraband, an offense in respect of blockade, or enemy service, the vessel should be seized; otherwise she should be released, unless suspicious circumstances justify a further search. If the vessel be released, an entry in the log book to that effect should be made by the boarding officer.

U. S. Naval War Code, 1900, Article 32.

#### **Procedure in stopping.**

A ship desiring to stop another should make for her, hoist her flag, and fire a blank gun-shot in her direction. At the same time a signal may be made according to the International Code.

In order to stop a vessel at night, it is necessary, when firing the blank shot, to have the lights on the masts and distinguishing lights exposed.

If, in spite of a shot being fired, the vessel does not stop, a ball must be sent past the bows of the retreating vessel. If she still resists stoppage, it is permissible to fire at her and pursue her in order to force her to stop.

When commencing to fire at the vessel, it is desirable to fire the first shot over her hull between the masts. But such leniency is not obligatory, especially if a steamer which is being stopped has an advantage in speed by which she may hope to escape from her pursuer.

Any vessel which has made a clear attempt to escape from a cruiser, in consequence of which the latter has been obliged to pursue her and to use force to stop her, is liable to be seized; it is, however, open to the Commander of the cruiser, if he consider it desirable, after stopping the vessel, to subject her to an examination as a preliminary, and make his further action depend on the result of the examination.

Russian Instructions, 1900, secs. 2 and 3.

#### **Examination of papers.**

The examination begins with a request to the master:—

- (a.) To state the name and nationality of his vessel.
- (b.) To state what port she is bound for, and where she comes from.
- (c.) To produce his log-book and all papers concerning the vessel and cargo.

Annexed is a list of the principal ship's papers found in merchant-vessels of certain nationalities (Appendix I).

When proceeding to examine the papers, the officer should pay special attention to the log-book, and should endeavour to make himself acquainted with all the circumstances of the voyage, the place on the chart where the master considers himself to be, and the last entries in the log-book.

In examining the papers relating to the nationality of the vessel, the officer should note the port of registry, the number on the register, the names and nationality of the owners, the place where, and the time when, the vessel was built, and also whether it was bought from subjects of the enemy after the declaration of war, with the object of protecting enemy's property.

When examining the papers relating to the cargo, the officer should determine the nature and amount of goods, the place from which they have been brought and their destination, and the names and nationality of the consigners and consignees. At the same time, it is important to ascertain whether there are among the goods any articles of contraband of war, and who are the owners of the cargo, subjects of the enemy or of a neutral Power.

In examining the papers concerning the composition of the crew and the passengers, the officer should ascertain the nationality and calling of these persons, and should endeavour to determine whether there are among the passengers any persons belonging to the enemy's forces, and which of the crew could be detained under Article 18 of the "Regulations in regard to Naval Prizes."

After concluding the examination of the vessel's papers, the officer should request the master to produce any mails that may be on board, and should search them for correspondence of the enemy and for any packages addressed to the enemy's ports.

The officer should take notes concerning all papers shown to him, and should write down all that he considers most necessary. When examining the papers, he may at his discretion address questions to the master, mate, and other members of the crew.

Russian Instructions, 1900, secs. 11-17.



### Consequences of the examination of papers.

The officer should close the examination and detain the vessel in the following cases:—

- (a.) If the vessel proves to belong to the enemy.
- (b.) If there are no ship's papers, particularly such as make it possible to determine the nationality of the vessel and to verify the circumstances of her voyage; or if the ship's papers are thrown overboard, or destroyed in any other way.
- (c.) If there are among the papers any which make the officer suspect that the vessel belongs to the enemy.
- (d.) If the officer comes to the conclusion that the papers are not genuine.
- (e.) If it appears from the papers that the vessel has been bought by the subject of a neutral State from subjects of the enemy, and there is reason to suppose that a fictitious sale has taken place with the object of protecting enemy's property.

If the officer is convinced that the papers are in perfect order, that the vessel is really a neutral one, that there cannot be amongst the goods on board any articles of contraband of war intended for the enemy, and generally that there is no ground whatever for detaining the vessel, he should leave her without delay, observing the rules laid down below in Secs. 28, 29, and 30 (Conclusion of the Examination).

If the officer has doubts about the truth of the information obtained from the examination of the papers, especially if the vessel is bound for an enemy's port, or if he has reason to suppose, from the general indications of the movements, direction, and position of the vessel stopped, that the eventual destination of the vessel or of her cargo is any enemy's port, he should proceed to the examination or search of the whole vessel, in order to ascertain whether there are any objects of contraband of war in her cargo.

Russian Instructions, 1900, secs. 18-20.

When the commander of a warship visits or searches a ship, he should be careful not to make her deviate more than is necessary from her original course, and to avoid as far as possible causing her inconvenience.

The commander of a warship may, when pursuing a ship, either not show the colours of a ship of the Imperial Navy, or show false colours. He must, however, before ordering her to stop, invariably fly the colours of a ship of the Imperial Navy.

Under no circumstances may the commander of a warship require the ship he intends to visit or search to send her boat's crew or papers to his own ship.

The commander of a warship shall intimate by means of signal flags or whistles to the other ship his intention to visit her. At night-time, however, he shall hoist a white light above the flag of the warship, and substitute signals corresponding to the signal flags.

When, on account of bad weather, his intention to visit cannot be intimated in the way mentioned in the preceding clause, or when the ship in question does not obey the signal therein mentioned, he shall order her to stop by discharging in succession two blank shots, and, in case of further necessity, by firing a shot across her bows.

When, notwithstanding the warning mentioned in the preceding clause, the ship still does not obey the order to stop, shots should be fired at her masts and yards, and, finally, at the hull.

When a ship has stopped, the commander of the warship shall send off to her in a boat a visiting officer with subordinate officers, according to circumstances.

The boat's crew must not carry arms; there is, however, no objection to the boat being provided with them.

Should it appear necessary to the visiting officer, he may, when boarding the ship, take with him two, or less, of the boat's crew.

If the visiting officer considers that there is ground for suspicion, he shall request in a proper and polite manner to see the ship's papers. If, however, the master of the ship refuses to produce the ship's papers, a peremptory demand for them may be made.

If, after the visiting officer has examined the ship's papers, he considers that the ship should not be captured, he shall on receipt of orders from the commander of the warship at once release her.

If, after the visiting officer has examined the ship's papers, he still considers that there is ground for suspicion, he shall search the ship.

In the case mentioned in the preceding clause, the visiting officer may, if it appear necessary to him, cause the boat's crew to come on board the ship and assist him, or he may apply for assistance to the warship.

Search shall be conducted in the presence of the master of the ship, or of his representative.

The master of the ship, or his representative, shall be made to open all places or receptacles which are closed. Should he refuse to do so, steps may be taken to meet the emergency.

If the visiting officer, in the course of his search, considers that the ship should not be captured, he shall stop the search, and, on receipt of orders from the commander of the warship, at once release her.

Before leaving the ship, the visiting officer shall ask the master whether he has any objections to offer with regard to the proceedings in connection with the visit or search, or on any other point, and, should the master mention any objections, cause him to present them in writing.

The visiting officer shall enter in detail in the ship's log the time of the visit or search, the locality, the name of the warship, and the name, surname, and rank of her commander, and shall affix his signature in full thereto, stating also his rank.

In the case of a ship which is exempted from capture, either because she has not received notice of the blockade, or because she comes under clause 2 of Article 30, or because, as specified in Article 36 and Article 38, she was not aware of the fact that hostilities had broken out, the visiting officer shall enter in the ship's log, or in the papers which show her nationality, a warning in accordance with Form 2 or Form 3 and order her to turn back, or take suitable steps to make her change her course in some other direction, &c.

Japanese Regulations, 1904, Articles 51-65.

The captains of H. M. ships during a war have the right, in conformity with the following instructions, to visit enemy or neutral merchant vessels, to search them, and to seize them, as well as the

enemy and neutral goods found on board and in exceptional cases to destroy them.

During an armistice this right of capture is suspended only when expressly agreed.

German Prize Rules, 1909, Article 1.

**Purpose of visit and search.**

The purpose of visiting and searching of a merchant ship is to determine:—

(a) To what nationality the ship belongs.

(b) Whether there is contraband on board.

(c) Whether it (the ship) is assisting the enemy by unneutral service.

(d) Whether it has been guilty of a breach of blockade.

The visit and search shall be made only when the captain believes that results will follow. All measures are to be carried out in a form whose observance, even against the enemy, will comport with the dignity of the German Empire, and with a regard for neutrals conformable to the usages of international law and German interest.

German Prize Rules, 1909, Article 4.

**Mail steamers not exempt.**

The inviolability of mails does not exempt neutral mail steamers from the laws and usages of war on the sea, nor from capture; but they shall be searched only when urgent, with all possible consideration and despatch.

German Prize Rules, 1909, Article 7.

81. The captain must as much as possible avoid diverting a ship under a neutral flag from her course during the visit and search; he shall especially endeavor to cause the ship the least possible inconveniences, especially will he in no circumstances require the master to come on board the man-of-war, or that a boat, men of the crew, the ship's papers, etc., be sent on board.

82. If the captain intends to halt a ship, he will cause her to stop by means of signals and blowing of the siren. Ensign or pennant are to be displayed not later than the time of this signal; by night the first is to be illuminated. During the pursuit the display of the war ensign is not necessary, the flying of any merchant flag (desired) is permissible.

83. If the ship does not stop upon signal, two successive blank charges are to be fired, and if necessary a shotted charge over the ship.

If the ship then does not stop, or makes resistance, the captain will compel her to stop.

84. When the ship has stopped, the captain will send on board an officer, accompanied by a second officer and not more than three men as witnesses and for assistance, in an unarmed boat, manned with the usual crew and carrying the flag. The officers of the boarding party will carry side arms, the men no arms. The remainder of the boat's crew will have their small arms in the boat.

85. If the weather makes boating impossible, the captain will prescribe a given course to the ship, in case he has serious suspicion of her, and will follow himself, until it is possible to carry out the visit.

86. Usually in this the officer goes directly on board, accompanied only by the officer sent with him, and asks politely, but definitely, for the ship's papers to be produced; if the master declines, he orders their production. A further refusal justifies the capture of the ship.

87. The officer submits the papers to a thorough examination, proving the identity of the ship, as far as it is possible without making an exact examination, with the data in the papers (name on the bow, funnel marks, house flag; names on boats and buoys, etc.), and her nationality, age, home and departure ports, destination of the ship, kind and destination of the cargo, etc.

88. If the officer upon examining the papers forms the opinion that the ship is not liable to seizure, he releases her, with the approval of the captain, and after making an entry in the ship's log book and certificate of nationality (visiting ship, time, place of visit, reason for release, name and rank of the captain and of the boarding officer). Before releasing the ship, he makes request of the Master for a written declaration whether and what objections he has to the carrying out of these measures.

89. If the master has objections to make, the officer will make his comment upon these in a brief report. The Captain will forward this declaration, with his own endorsement, immediately to the Chief of the Admiral Staff.

90. If the officer forms the opinion upon examining the ship's papers that the ship is suspicious, he will proceed to search. This consists of carefully fixing the agreement of the ship with the data in her papers (alterations in exterior features, distinguishing marks, draft marks, name-boards, are to be noted) and testing of the correctness of the data in the papers concerning the relation of ship and cargo. The search will be made by questioning the Master, crew (if **change of flag** be suspected, compare the signatures of the crew with those in the muster roll, provided the law concerning the flag determines the national composition of the crew) and passengers, with whom, however, no compulsion by threat is to be used; and by examining the ship and cargo. This will be done with the assistance of the boat's crew, which will be increased if necessary, and—if he does not refuse—with the attendance of the Master, who will cause the locks and packings to be opened, or suggest the most appropriate way of opening. Any injury is to be avoided as far as possible.

91. If the making of the search is proved to be necessary, but at the time is not practicable to carry out, the ship will be searched later at a suitable place. If this causes serious disadvantages to the ship to be searched, the Captain will proceed to the provisional capture. (See 97.)

92. If the officer is convinced by the search that the ship is not liable to capture, he will proceed carefully to restore the previous condition of the ship and cargo, according to 88 and 89. Claims of the Master for damages are if possible to be regulated before the ship is released.

93. If the search shows that only a part of the cargo is confiscable, the Captain will decide whether he will capture the ship or only seize the questionable part of the cargo, according to 121, or release the ship without further proceedings. A renunciation of the seizure in return for a payment is not permissible. (See also 46.)

**Stopping.**

When you decide to search a vessel you shall first notify it by firing a blank shot and by displaying your flag. At this signal the vessel is bound to display its colors and to stop to await your search.

If it continues on its way and tries to flee, you will pursue it and stop it if need be by force.

In case of armed resistance on its part, you will capture it without other summons.

Attempt at flight is not alone sufficient to justify capture.

As soon as the summoned vessel has stopped, you will send a boat to it.

No exact rule can be fixed on the subject of the distance at which the cruiser should stop during the search. You will act according to circumstances and the state of the weather.

French Naval Instructions, 1912, secs. 88-91.

If the examination of these papers shows with certainty that the vessel is neutral, its destination innocent, and its cargo innocent in character, the visiting officer will set forth the result of his visit on the journal of the said ship, and you will let the ship proceed on its route.

The absence of one of the papers above indicated would not alone justify capture if the other papers taken together prove the neutrality of the vessel and the regularity of the voyage.

**Papers thrown overboard, suppressed, or abstracted.**

Nevertheless, if it is established that one or more of these papers have been thrown overboard, suppressed, abstracted, or falsified, the vessel searched should be captured without the need of examining by whom or for what reason they were thrown overboard, suppressed, abstracted, or falsified.

If the examination of the papers leaves you in any doubt or confirms you in the suspicion:

(1) Respecting the nationality of the vessel: then you will capture it.

(2) Respecting its destination or the innocent character of its cargo: then you may proceed to search the cargo.

This search is made by the captain and crew of the ship searched under the eyes of the visiting officer who should not take part in it himself except in case of refusal of the others.

The ship's papers are full proof of the voyage of the vessel as well as of the place for discharging the goods, unless the vessel is met when manifestly having deviated from the route which it should follow according to its papers and without being able to show sufficient cause for such deviation.

All these operations of search should be made with the greatest courtesy and moderation and, if mail ships are involved, with the greatest speed possible. (See sections 85 and 126.)

French Naval Instructions, 1912, Articles 97-101.

**Visit, search, seizure, and attack by "armed" merchant vessel.**

The exercise of the rights of visit, search, and seizure, as well as every attack, on the part of an armed merchant ship against a German

or neutral merchant ship constitutes piracy. The crew is to be proceeded against according to the regulations for procedure extraordinary under the laws of war.

Orders of the Chief of the Admiral Staff of the German Navy, June 22, 1914, Article 1.

*The "Maria," 1 C. Rob., 360.*—In this case the court said: "This right, [of visit and search] is so clear in principle, that no man can deny it who admits the right of maritime capture; because, if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. \* \* \* The right is equally clear in practice, for practice is uniform and universal on the subject. The many European treaties which refer to this right, refer to it as preexisting, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception of even Hubner himself, the great champion of neutral privileges."

*The "Anna Maria," 2 Wheaton, 327.*—In this case the court said that the right of visitation and search, is a belligerent right which cannot be questioned, but that it must be exercised with as much regard to the safety of the vessel detained as is consistent with a thorough examination.

*The "Eleanor," 2 Wheaton, 345.*—In this case the court said that to detain for examination is a right which a belligerent may exercise over every vessel, not a national vessel, that he meets with on the ocean.

#### NECESSARY SHIPS' PAPERS.

In order to avoid and prevent on both sides all disputes and discord, it is agreed that, in case one of the parties shall be engaged in a war, the ships and vessels belonging to the subjects or inhabitants of the other shall be furnished with sea-letters or passports, expressing the name, property, and port of the vessel, and also the name and place of abode of the master or commander of the said vessel, in order that it may thereby appear that the said vessel really and truly belongs to the subjects of the one or the other party. These passports, which shall be drawn up in good and due form, shall be renewed every time the vessel returns home in the course of the year. It is also agreed that the said vessels, when loaded, shall be provided not only with sea-letters, but also with certificates containing a particular account of the cargo, the place from which the vessel sailed, and that of her destination, in order that it may be known whether they carry any of the prohibited or contraband merchandizes mentioned in the 9th article of the present treaty; which certificates shall be made out by the officers of the place from which the vessel shall depart.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, Article XI.

To ensure to the vessels of the two contracting parties the advantage of being readily and certainly known in time of war, it is agreed that they shall be provided with the sea-letters and documents hereafter specified:

1. A passport, expressing the name, the property, and the burthen the vessel, as also the name and dwelling of the master, which passport shall be made out in good and due form, shall be renewed as

often as the vessel shall return into port, and shall be exhibited whensoever required, as well in the open sea as in port. But if the vessel be under convoy of one or more vessels of war, belonging to the neutral party, the simple declaration of the officer commanding the convoy, that the said vessel belongs to the party of which he is, shall be considered as establishing the fact, and shall relieve both parties from the trouble of further examination.

2. A charter-party, that is to say, the contract passed for the freight of the whole vessel, or the bills of lading given for the cargo in detail.

3. The list of the ship's company, containing an indication by name and in detail of the persons composing the crew of the vessel. These documents shall always be authenticated according to the forms established at the place from which the vessel shall have sailed.

As their production ought to be exacted only when one of the contracting parties shall be at war, and as their exhibition ought to have no other object than to prove the neutrality of the vessel, its cargo, and company, they shall not be deemed absolutely necessary on board such vessels belonging to the neutral party as shall have sailed from its ports before or within three months after the Government shall have been informed of the state of war in which the belligerent party shall be engaged. In the interval, in default of these specific documents, the neutrality of the vessel may be established by such other evidence as the tribunals authorised to judge of the case may deem sufficient.

Treaty of Amity and Commerce concluded between the United States and Prussia, July 11, 1799, Article XIV.

To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two contracting parties, they have agreed, and do hereby agree, that in case one of them should be engaged in war, the ships and vessels belonging to the citizens of the other must be furnished with sea-letters or passports, expressing the name, property and bulk of the ship, as also the name and place of habitation of the master and commander of the said vessel, in order that it may thereby appear that the ship really and truly belongs to the citizens of one of the parties; they have likewise agreed that when such ships have a cargo, they shall also be provided, besides the said sea-letters or passports, the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods are on board the same; which certificates shall be made out by the officers of the place whence the ship sailed in the accustomed form; without which requisites said vessel may be detained, to be adjudged by the competent tribunal, and may be declared lawful prize, unless the said defect shall be proved to be owing to accident and shall be satisfied or supplied by testimony entirely equivalent.

Treaty of Peace, Amity, Navigation, and Commerce concluded between the United States and New Granada (Colombia), December 12, 1846, Article XXII.

To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two contracting parties, they agree that, in case one of them should be engaged in war, the ships and vessels belonging

to the citizens of the other must be furnished with sea-letters or passports, expressing the name, property and bulk of the ships, as also the name and place of habitation of the master and commander of said vessel, in order that it may thereby appear that said ship truly belongs to the citizens of one of the parties; they likewise agree that such ships being laden, besides the said sea-letters or passports, shall also be provided with certificates, containing the several particulars of the cargo, and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed in the accustomed form; without such requisites said vessels may be detained, to be adjudged by the competent tribunal, and may be declared legal prize, unless the said defect shall prove to be owing to accident, and supplied by testimony entirely equivalent.

Treaty of Peace, Friendship, Commerce and Navigation concluded between the United States and Bolivia, May 13, 1858, Article XXII.

Seizure of a vessel or cargo, enemy or neutral, can occur only in the following cases:

1. When the result of the visit shows that the papers are not in proper form.

Institute, 1882, p. 50.

The nationality of the vessel, its cargo and crew, should be shown in the ship's papers found upon the vessel which has been seized, provided however that there may always be a subsequent production before the prize courts.

The question as to whether the conditions as to nationality are fulfilled is decided in accordance with the law of the State to which the vessel belongs.

The legal document showing the sale of an enemy vessel made during the war must be perfect, and the vessel should be registered before it leaves the port of departure, and in accordance with the law of the country whose nationality it acquires. The new nationality can not be acquired by a vessel which is sold during a voyage.

The ship's papers required by international law are the following:

1. Documents relating to the ownership of the vessel;
2. Bill of lading;
3. List of the crew, with an indication of the nationality of the master and the crew;
4. Certificate of nationality, if the documents mentioned under 3 do not cover it;
5. Log-book.

The Documents listed in the preceding article should be drawn up clearly and without ambiguity in order to be adequate proof.

If, in ascertaining whether it is a case for seizure, there is evidence as to the nationality or destination of the vessel, or as to the nature of the cargo, or as to the nationality of the master and crew, depending upon which point is at issue, and one of the ship's papers ordinarily relating to this question is lacking, the mere absence of this paper is not a ground for seizure, provided however that the ship's other papers are in perfect agreement on the point in question.

Institute. 1882, pp. 50-51



A neutral is bound not only to submit to search, but to have his vessel duly furnished with the genuine documents requisite to support her neutral character. The most material of these documents are, the register, passport, or sea-letter, muster-roll, log-book, charter party, invoice, and bill of lading. The want of some of these papers is strong presumptive evidence against the ship's neutrality; yet the want of any one of them is not absolutely conclusive. *Si aliquid ex solemnibus deficiat, cum aequitas poscit subveniendum est.* The concealment of papers material for the preservation of the neutral character justifies a capture, and carrying into port for adjudication, though it does not absolutely require a condemnation. It is good ground to refuse costs and damages on restitution, or to refuse further proof to relieve the obscurity of the case, where the cause labored under heavy doubts, and there was *prima facie* ground for condemnation independent of the concealment. The spoliation of papers is a still more aggravated and inflamed circumstance of suspicion. That fact may exclude further proof, and be sufficient to infer guilt; but it does not, in England, as it does by the maritime law of other countries, create an absolute presumption *juris et de jure*; and yet a case that escapes with such a brand upon it is saved so as by fire. The Supreme Court of the United States has followed the less rigorous English rule, and held that the spoliation of papers was not, of itself, sufficient ground for condemnation, and that it was a circumstance open for explanation; for it may have arisen from accident, necessity, or superior force. If the explanation be not prompt and frank, or be weak and futile; if the cause labors under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is good cause for the denial of further proof; and the condemnation ensues from defects in the evidence, which the party is not permitted to supply. The observation of Lord Mansfield, in *Bernardi v. Motteux*\*, was to the same effect. By the maritime law of all countries, he said, throwing papers overboard was considered as a strong presumption of enemy's property; but, in all his experience, he had never known a condemnation on that circumstance only.

Kent, vol. 1, pp. 166, 167; \* Doug., 581.

The acknowledged belligerent right of visitation and search draws after it a right to the production and examination of the ship's papers. With respect, however, to the nature and character of the papers which the neutral is bound to have on board, there is some difference of opinion. Some continental writers contend that the ordinary sea letter or passport, is all that is required, as that must establish the nationality of the vessel. If, however, it has been agreed between the belligerent and neutral, that certain papers executed in a particular form shall be carried, the absence of such papers, so executed, may be good ground of seizure. But English and American writers, as well as the decisions of the prize courts of the two countries, have held, that the neutral vessel may be required to have on board, and to produce when visited, such other documentary evidence as is usually carried, and deemed necessary to establish the character of the ship and its cargo; and that the absence or non-production of such papers, may, or may not, be good cause for

capture, and condemnation, according to the particular circumstances of the case. The rule is very clearly stated by Chancellor Kent. "A neutral is bound," he says, "not only to submit to search, but to have his vessel duly furnished with the genuine documents requisite to support her neutral character. The most material of these documents are, the register, passport or sea-letter, muster-roll, log-book, charter-party, invoice, and bill of lading. The want of some of these papers is strong presumptive evidence against the ship's neutrality, yet the want of any one of them is not absolutely conclusive. *Si aliquid ex solemnibus deficiat, cum equitas pascit subveniendum est.*"

Sometimes the neutral vessel produces the principal papers necessary to show her neutrality and the innocent character of her cargo, but conceals others which might have a contrary effect, as, for example, secret instructions relating to her destination and the landing of goods, etc. Those who deny the right of search beyond the verification of her sea-letter, or manifest, justify such concealment. But English and American writers are of opinion, that concealment is in itself a serious offense against the belligerent right of visit and search. The rule of international law on this question is thus stated by Chancellor Kent:

"The concealment of papers," he says, "material for the preservation of the neutral character, justifies a capture, and carrying into a port for adjudication, though it does not absolutely require a condemnation. It is good ground to refuse costs and damages on restitution, or to refuse further proof to relieve the obscurity of the case, where the cause labored under heavy doubts, and there was *prima facie* ground for condemnation independent of the concealment."

The spoliation of the papers of a ship, subjected to the visitation and search of a belligerent cruiser, is a still more aggravated circumstance of suspicion than that of their denial or concealment, and, in most countries, would be sufficient to infer guilt and exclude further proof. "But it does not in England," says Kent, "as it does by the maritime law of other countries, create an absolute presumption *juris et de jure*; and yet, a case that escapes with such a brand upon it, is saved so as by fire. The supreme court of the United States has followed the less rigorous English rule, and held that the spoliation of papers was not, of itself, sufficient ground for condemnation, and that it was a circumstance open for explanation, for it may have arisen from accident, necessity, or superior force. If the explanation be not prompt and frank, or be weak and futile; if the cause labors under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is good cause for the denial of further proof; and the condemnation ensues from defects in the evidence, which the party is not permitted to supply. The observation of Lord Mansfield, in *Bernardi v. Motteaux*, was to the same effect. By the maritime law of all countries, he said, throwing papers overboard was considered as a strong presumption of enemy's property; but, in all his experience, he had never known a condemnation on that circumstance only."

Halleck, pp. 621-624.

It is incumbent on all such vessels to be provided with certain documents for the proof of their neutral character, and of the inno-

gency of the adventure in which they are engaged, and it is agreed that they are obliged as a general rule to produce these proofs on the summons of a duly authorised person.

Hall, p. 747.

The occasions on which a neutral vessel may be seized for illicit acts affecting itself, or because its cargo is liable to confiscation, have for the most part been already specified. But there still remains to be noticed, as affecting it with penalties, a class of fraudulent or ambiguous acts of the owner or master, consisting in—

1. The possession of false documents.
2. The destruction or concealment of papers.

That a vessel is furnished with double or false documents is invariably held to be a sufficient reason for bringing her in for adjudication; and according to Russian practice, at any rate, a false passport, and in Spanish practice double papers of any kind, entail confiscation of both ship and cargo; but generally falsity of papers is regarded with leniency, and is only considered to be noxious when there is reason to believe that the fictitious documents were framed in order to deceive the capturing belligerent, and that they would therefore fraudulently oust the rights of the captors, if admitted as genuine. The ground of this leniency is that, apart from indications that they are directed against the interests of a particular belligerent, they are as likely to have been provided as a safeguard against the enemy of the captor as against the captor himself.

The destruction or 'spoliation' of papers, and even, though to a less degree, their concealment, is theoretically an offence of the most serious nature, the presumption being that it is effected for the purpose of fraudulently suppressing evidence which if produced would cause condemnation. The French Regulations of 1704, repeated in 1744 and 1778, declared to be good prize all vessels, with their cargoes, on simple proof of the fact that papers had been destroyed, irrespective of what the papers were; but the severity of the rule has been tempered in practice, it being commonly required that the destroyed papers should be proved to be such as in themselves to entail confiscation. In England and America a milder practice is in use. Spoliation or concealment of papers, 'if all the other circumstances are clear,' only affects the neutral with loss of freight; but it is a cause of grave suspicion, and may shut out the guilty person from any indulgence of the court, as for example, from permission to bring further proof if further proof be necessary. If the circumstances are not clear, if, for example, spoliation takes place when the capturing vessel is in sight, or at the time of capture, or subsequently to it without the destroyed papers having been seen by the captor, further proof would probably be shut out as, of course, the natural inference from the circumstances being that they have been destroyed because their contents were compromising.

Hall, pp. 760, 761.

Since the purpose of visit is to ascertain the nationality of a vessel, the character of her cargo and passengers, and the ports from and to which she is sailing, it is obvious that this purpose can not be realised in case the visited vessel is deficient in her papers. As

stated above in Vol. 1, Sec. 262, every merchantman ought to carry the following papers: (1) A certificate of registry or a sea-letter (passport); (2) the muster-roll; (3) the log-book; (4) the manifest of cargo; (5) bills of lading, and (6) if chartered, the charter-party. Now, if a vessel is visited and can not produce one or more of the papers mentioned, she is suspect. Search is, of course, admissible for the purpose of verifying the suspicion, but it may be that, although search has not produced any proof of guilt, the suspicion is not dispelled. In such case she may be seized and brought to a port for thorough examination. But, with the exception of the case that she cannot produce either certificate of registry or a sea-letter (passport), she ought not to be confiscated for deficiency in papers only. Yet, if the cargo is also suspect, or if there are other circumstances which increase the suspicion, confiscation would be, I believe, in the discretion of the Prize Court.

The Declaration of London does not mention the point, and the International Prize Court would, therefore, have to evolve a system of rules to be applied in cases concerned.

Mere deficiency of papers does not arouse the same suspicion which a vessel incurs if she destroys or throws overboard any of her papers, defaces them, or conceals them, and in especial in case the spoliation of papers takes place at the time when the visiting vessel comes in sight. Whatever her cargo may be, a vessel may at once be seized without further search so soon as it becomes apparent that spoliation, defacement, or concealment of papers has taken place. The practice of the several States has hitherto differed with regard to other consequences of spoliation, and the like, of papers, but confiscation is certainly admissible in case other circumstances increase the suspicion.

The Declaration of London does not mention the case of spoliation papers, and it would therefore be the task of the International Prize Court to evolve a uniform practice concerning the subject.

The highest suspicion is aroused through the fact that a visited vessel carries double papers, or false papers, and such vessel may certainly be seized. But the practice of the several States has hitherto differed with regard to the question whether confiscation is admissible for the mere fact of carrying double or false papers. Whereas the practice of some States, as Russia and Spain, answered the question in the affirmative, British and American practice took a more lenient view, and condemned such vessels only on a clear inference that the false or double papers were carried for the purpose of deceiving the belligerent by whom the capture was made, but not in other cases.

Since the Declaration of London does not mention the case of double or false papers, it would likewise be the task of the International Prize Court to evolve a uniform practice.

Oppenheim, vol. 2, pp. 543-545.

Any vessel is also liable to Detention, irrespectively of her national character, or the trade in which she is engaged, for:—

\* \* \* \* \*

#### (4) Deficiency in ship papers.

Holland, p. 3.

Irrespective of the character of her cargo, or her purported destination, a neutral vessel should be seized if she:

(1) Attempts to avoid search by escape; but this must be clearly evident.

(2) Resists search with violence.

(3) Presents fraudulent papers.

(4) Is not supplied with the necessary papers to establish the objects of search.

(5) Destroys, defaces, or conceals papers.

The papers generally expected to be on board of a vessel are:

(1) The register.

(2) The crew and passenger list.

(3) The log book.

(4) A bill of health.

(5) The manifest of cargo.

(6) A charter party, if the vessel is chartered.

(7) Invoices and bills of lading.

U. S. Naval War Code, 1900, Article 33.

#### FORMALITIES OF CAPTURE.

When, after the search has been conducted, the vessel is considered subject to capture, the officer who seizes the ship must:

1. Seal all the ship's papers after having inventoried them;

2. Draw up a report of the seizure, as well as a short inventory of the vessel stating its condition;

3. State the condition of the cargo which he has inventoried, then close the hatchways of the hold, the chests and the store-room and, as far as circumstances will permit, seal them;

4. Draw up a list of the persons found on board;

5. Put on board the seized vessel a crew sufficient to retain possession of it, maintain order upon it, and conduct it to such port as he may see fit.

If he thinks fit, the captain may, instead of sending a crew aboard a vessel, confine himself to escorting it.

Except for persons who may be considered prisoners of war or who are liable to punishment, a belligerent may not detain on a seized ship for more than a reasonable time, those necessary as witnesses in ascertaining the facts; but for insurmountable obstacles he must set them at liberty after the *procès-verbal* of their depositions has been drawn up.

If special circumstances require it, the captain, the officers, and a part of the crew of the captured ship may be taken on board the captor.

The captor shall attend to the maintenance of the persons detained, and shall always give them, as well as the crew, when they are set at liberty, means temporarily necessary for their further maintenance.

The seized ship must be taken to the nearest possible port belonging either to the captor State or to an allied belligerent Power, which offers safe refuge, and has means of easy communication with the prize court charged with deciding upon the capture.

During the voyage, the prize shall sail under the flag and the pendant, carried by the war-ships of the State.

The seized ship and its cargo shall, as far as possible, be kept intact during the voyage to port.

If the cargo includes articles liable to deteriorate easily, the captor, so far as possible with the consent of the captain of the seized ship and in his presence, shall take the best measures toward the preservation of these articles.

Institute, 1913, pp. 197, 198.

#### **Treatment of persons on board seized vessel.**

The only persons on board the ship which has been seized who shall be considered prisoners of war are those who form part of the military force of the enemy, and those who have assisted the enemy or are suspected of having assisted the enemy.

The master, the supercargo, the pilot and other persons whom it will be necessary to hear in order to ascertain the facts, shall be temporarily retained on board. These persons are not authorized to quit the vessel, after giving their depositions, except at the order of the court of inquiry.

The persons found and kept on board shall be fed, and in case of necessity, clothed and cared for by the government of the State to which the captor vessel belongs. The master shall furnish security for the expenses resulting therefrom, which shall be repaid according to the judgment.

The members of the crew shall be allowed to keep their personal effects.

The captor may not disembark in waste and uninhabited countries the members of the crew who are not needed at the inquiry and who must be sent away immediately for lack of space upon the captor vessel or lack of provisions. But the captor is permitted to transfer the men to neutral or allied vessels which he may meet, to be disembarked in cultivated and inhabited territories.

The captain of the captor vessel is responsible for the good treatment and entertainment of the persons found on board the vessel seized by the crew of the captor vessel and by the crew which mans the vessel seized; he should not permit even those persons who are prisoners of war to be employed at humiliating occupations.

Institute, 1882, pp. 55, 56.

As soon as the Commander has come to the determination to detain the Vessel, he should give notice to the Master, and may state to him the ground on which the Detention is made. The Commander should then without delay secure possession of the Vessel, by sending on board one of his Officers and some of his own Crew. If by reason of rough weather or other circumstances this is impracticable, the Commander should require the Vessel to lower her flag, and to steer according to his orders.

#### **Papers to be secured.**

Upon obtaining possession of the Vessel, the first duty of the Commander is to secure all the Papers belonging to the Vessel, as well those which are usually denominated "Ship Papers," and which relate only to the Vessel and Cargo, as all other Papers, of whatever description, which may be either delivered up or found on board.

The Vessel's Papers, as soon as secured, should be arranged and numbered in consecutive order, care being taken that the enclosures are not separated from their envelopes. The importance of securing all the Vessel's Papers is manifest, inasmuch as the evidence to acquit or condemn the Prize must in the first instance come solely from the Prize herself, namely, from the Papers on board and from the depositions on oath of the principal persons belonging to the Prize.

**Papers to be verified by affidavit.**

As soon as the Vessel's Papers have been arranged and numbered, an Affidavit should be prepared for their verification. The Affidavit may, in default of directions from the Admiralty, be in Form No. 4, page 98, and should always, if possible, be made by the person who found the Papers, or to whom they were delivered up at the time of the Capture. The Affidavit should then be faircopied on foolscap paper, a broad margin being left at the side, and the whole of the Vessel's Papers, numbered as aforesaid, should then be annexed thereto.

If any Papers have been destroyed or thrown overboard, a further separate Affidavit of the fact must be prepared. The Affidavit may, in default of directions from the Admiralty, be in form No. 5, page 99, and it should, if possible, be made by one of the persons who saw the Papers destroyed or thrown overboard, or who succeeded in saving any of them after they had been thrown overboard. All Papers so saved must be arranged and numbered before the Affidavit is made, and, after it has been made, must be annexed thereto.

Again, should any Papers be found concealed in any part of the Vessel, a further separate Affidavit of the fact must be prepared. The Affidavit may, in default of directions from the Admiralty, be in Form No. 6, page 100, and it should, if possible, be made by the person who discovered the Papers. All Papers so found concealed should be arranged and numbered before the Affidavit is made, and, after it has been made, must be annexed thereto.

The Affidavits should, on the first convenient opportunity, be sworn before one of Her Majesty's Consuls or Vice-Consuls abroad, or before some other person duly commissioned to administer Oaths in Prize Matters; but no Naval Officer, although so commissioned, may act as Commissioner, or administer oaths, in any case in which he himself is personally interested.

**Account to be taken of valuables.**

The Commander should cause an Account to be taken in writing of all money and valuables found on board the Vessel. It will be convenient that this Account should be taken in duplicate, and duly certified, and one copy given to the Master. In default of directions from the Admiralty, the Certificate may be in Form No. 7, page 101.

**If necessary, the vessel afterwards to be released.**

If, after the Detention of the Vessel, there should come to the knowledge of the Commander any further facts tending to show that the Vessel has been improperly detained, he should immediately release her, taking care to replace, as far as possible, every thing in its original position.

**General duties on making a capture.**

When any Ship or Vessel shall be captured or detained, her hatches are to be securely fastened and sealed, and her lading and furniture, and in general, everything on board, are to be carefully secured from embezzlement; the Officer placed in charge of her shall prevent anything from being taken out of her until she shall have been tried, and sentence shall have been passed on her in a Court of Prize.

**Evidence and documents.**

The Captain of the capturing or detaining Ship shall cause the principal Officers of the Vessel detained, and such other persons of the Crew as he shall think fit, to be examined as Witnesses in the Prize Court to prove to whom the Vessel and Cargo belong; and he shall send to the Court all Passports, Custom-house Clearances, Log-Books, and all other Ship's Papers, which shall be found on board, without suffering any of them to be on any pretence secreted or withheld.

**Treatment of prisoners.**

The Captain and the Prize Master are to take particular care that all Prisoners of War are treated with humanity; that their personal property is carefully protected; that they have their proper allowance of provisions, viz., two-thirds of all species, except Spirit, Wine, or Beer, of which none shall ever be issued to them; and that every comfort of air and exercise, which circumstances admit of, be allowed them; but, to prevent any hostile attempts on their part, they are to be always attentively watched and guarded, especially when many of the Ship's Company may happen to be employed aloft.

**Acting as a ship of war without a commission.**

If any Ship or Vessel shall be taken acting as a Ship of War or Privateer, without having a Commission duly authorising her to do so, a full report of all the particulars is at once to be made to the Admiralty.

**British subjects serving in an enemy's ship.**

\* If any person found serving on board an Enemy's Ship of War or Privateer shall be suspected to be one of Her Majesty's subjects, not having lawfully renounced his allegiance, he shall be kept Prisoner until directions are received as to the mode in which he shall be dealt with. The Captain shall, by the first opportunity, send to the Admiralty an account of such suspected person, and of his place of birth, if known, and also any statements he may voluntarily make; and shall likewise direct some of the Officers and Men of the Ship to notice very particularly every circumstance of the case, that they may be able to give evidence.

Holland, pp. 69-74.

If, after visit and search, the commander of the warship still thinks that there is ground for suspicion, he shall cause the visiting officer to hear the explanations of the master, and, if from these explanations he still considers that the ship should be captured, capture her.



In deciding whether a ship ought to be captured or not, the commander shall be guided by the nature of the ship, her equipment, her cargo, the ship's papers, the master and crew, and their testimony, &c.

If the commander of the warship decides that the ship should be captured, he shall communicate to the master of the ship the reasons for her capture, and, sending a commissioned officer, with the necessary petty officers and men, cause him to take possession of her. If, on account of bad weather or for other reasons, he cannot dispatch the commissioned officer with the petty officers and men, he shall cause the ship to haul down her flag and direct her course in accordance with the orders of the commander of the warship. Should she not obey his orders he may take steps to meet the emergency.

When the commander of a warship captures a mail steamer, he shall remove from the ship, in their sealed condition, mail bags which he considers harmless, and take steps to dispatch them, at the very first opportunity to their destination.

The commander of the warship shall cause the passengers on board a ship which has been captured, with the exceptions of persons who are contraband of war, and those whom it is necessary to detain as witnesses, to be landed at as convenient a port as possible.

If the commander of the warship has certain knowledge, after he has captured a ship, that the capture was improper, he shall at once release her.

Japanese Regulations, 1904, Articles 65-70.

#### **Right of capture does not apply to public vessels.**

The right of capture does not apply to neutral public vessels.  
\* \* \*

Public vessels are the vessels of war as well as those employed in the service of the state and under state control. Vessels which are otherwise the property of the state will be similarly regarded.

The necessary distinctive features of vessels of war are: War flag (together with the pennant, as a rule), commander commissioned by the state whose name appears in the navy list, and military disciplined crew. See articles 2 and 4 and 6 of the VII Convention of the 2d Hague Conference.

German Prize Rules, 1909, Article 2.

94. If the search, after the hearing of the Master, shows such circumstances that the captain believes that the condemnation of the ship may be expected, he will as a rule capture the ship (See 119).

95. The capture will be effected by communicating a protocol to the Master, taking possession of the ship with a prize crew, and hoisting the war flag. If taking possession of the ship and therewith the hoisting of the war flag is not permissible, the ship will be directed to haul down her flag and regulate her speed and course according to the orders of the captain.

The ship does not become a man-of-war by any such flying of the war flag.

96. The captain will report concerning the capture as soon as possible directly to the Chief of Admiral Staff. The report must contain the name of the Master and of the ship, the flag carried at the time of visiting, time, place, and reasons for capture. The prize office will receive a copy of the report when the ship is brought in.

97. If proof appears, after the capture has been made, that a ship was wrongly captured, she is to be released without delay, according to 92. The report mentioned in 96 in this case also, with the data concerning the reasons for release, is to be rendered and by the Chief of Admiral Staff transmitted to the prize Court having jurisdiction.

98. If a ship that has been captured by the enemy has been retaken, before confiscation or employment in hostile undertakings by him, she is to be released if no ground exists from the German standpoint for her capture. Report of the release is to be made directly to the Chief of Admiral Staff.

German Prize Rules, 1909, Articles 94-98.

#### **Rights and duties of the prize officer.**

124. The prize officer commands the captured ship and with regard to her has the rights and duties of the Captain of the man-of-war captor. He will take care, before all else, for taking the ship in safe and for the observance of requirements of sections VII and VIII.

125. He provides for continuing the ship's log book, and will himself keep a journal from the time of coming on board, in which all events concerning the voyage, the ship, the cargo, and the personnel are to be entered.

126. He must apprehend and prevent any attempt of the ship's crew to regain possession of her, unnecessary use of force is to be avoided.

127. He may take goods from the cargo, in the Master's presence, and against a receipt, which the execution of his orders may require.

128. If necessary, the prize officer may transship persons and, as far as he is empowered under 110, parts of the cargo to another vessel; the reasons he must enter in the log book. A transshipment is always warranted when it is done in the interest of the safety of persons or preservation of the cargo.

129. If it is not possible to take the ship into the port ordered, he will seek another into which the prize may be taken (sec. 111). If this also is not possible, he will proceed to destroy the ship, under the provisions of No. 112 to 118, as soon as the safe salving of the persons, papers, and articles of evidence on board the ship has been accomplished. The requirements of No. 123 are to be observed.

130. Directly after arrival in a port, the prize officer will telegraph for further instructions to the Chief of Admiral Staff.

131. If the port reached is German or belongs to an allied or a neutral power which allows generally the bringing in of prizes, the prize officer will deliver the prize there. The delivery in a German Port will be made to the competent port authorities, otherwise to the consular representative of the German Empire or of an allied power with simultaneous delivery of the papers, reports, and other means of evidence, for further transmission to the prize office. At the same time the persons who under 102 are to be let go free are to be released, so far as they have not to be retained as witnesses.

German Prize Rules, 1909, Articles 124-131.

106. The captain must immediately upon the capture of a ship or the seizure of goods take the measures which are necessary for their security and for the prize court proceedings.

107. If circumstances require a quick separation of the man-of-war from the captured ship, the officer commanding the prize-crew (prize officer) is to be entrusted with these measures.

108. The captain must immediately take possession of the ship's papers, that is, all papers which are found on board and may serve as evidence before the prize court.

The papers will be arranged in the same condition in which they were found, and will be numbered: a list of them will be made and signed by the captain and the Master: papers and list will be sealed with the seal of the man-of-war and of the Master and, together with a statement of the condition of the ship and cargo and a copy of the report required by 96, will be given to the prize officer for safe keeping and delivered later to the prize office.

If the Master refuses his signature or his seal, this is to be noted at the end of the list.

If papers are found later, or if any have been destroyed or thrown overboard in the presence of witnesses, statements in the matter are to be drawn up with the witnesses, and submitted to the prize office.

109. Concerning the money and valuables found on board, a list, confirmed in writing, according to 108, of which the Master will retain a copy, will be drawn up and later delivered to the prize office.

The Captain is to see that proper steps are taken that no one may appropriate to his own use anything from the cargo, the ship's equipage, or, the ship's stores. The ship, equipage, stores, and cargo, as well as the personnel and material auxiliary means, are to be handled and managed with the greatest care.

110. H. M. ships and allied men-of-war and captured prizes may in case of necessity, fill their needs from the cargo, equipage, and supplies of captured hostile ships, giving receipts therefor, so far as the articles are not proved unquestionably to be neutral goods.

German Prize Rules, 1909, Articles 106-110.

#### LIENS UPON A VESSEL, AS AFFECTED BY CAPTURE.

A mortgage or lien on a ship sailing under the enemy's flag, whether it arises by contract or by law as a factor's lien—unless it is a general law of the mercantile world, as that which gives the lien of freight—is treated as a part interest in the ship and is not saved from the condemnation.

Westlake, vol. 2, p. 170.

*The "Tabago,"* 5 C. Rob., 218.—In this case, a claim was made by a British merchant on account of a bottomry bond executed to him in time of peace on a French vessel.

Held that while a captor takes *cum onere* of visible interests, he is not subject to secret liens on the vessel, among which may be classed bottomry bonds.

See also *The Hampton*, 5 Wall., 372, in which it was held that a mortgage on a captured vessel is a lien subject to be overridden by the capture; *The Battle*, 6 Wall., 498, in which claims against the captured vessel for supplies, materials and work and labor were dismissed; *The Rossia*, W. H. Gill's claim, Russian and Japanese Prize Cases, vol. 2, p. 43, in which a claim arising out of the payment of expenses necessary for the continuance of the voyage was dismissed; *The Nigretia*, 2 id., 208; *The Frances*, 8 Cranch, 418; *The Carlos F. Roses*, 177 U. S., 655.

*The "Marianna," 6 C. Rob., 24.*—This was the case of a vessel, originally American, but sold to a Spaniard and sailing under the Spanish flag, when seized. An American citizen put in a claim by virtue of a lien on the vessel for the payment of the balance of the purchase money out of the freight.

Held that where as in this case the vessel must be considered to have been legally transferred, and where she flies the flag of the country of the purchaser, that is sufficient to warrant her condemnation. Captors are supposed to lay hands on gross tangible property on which there are many just claims outstanding which can have no operation on her.

*The "Aina," 1 Spinks, A. and E. Rep., 313.*—In this case, a claim was made on behalf of a neutral on the ground that he was the mortgagor of a one-third interest in the vessel.

The court said that it knew of no case in which the mortgage-claim of an alien was allowed to defeat the captor's claims, though possibly it might operate to produce some mitigation of damages.

If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods.—*Declaration of London, Article 64.*

A cruiser has captured a neutral vessel on the ground, for example, of carriage of contraband or breach of blockade. The prize court releases the vessel, declaring the capture to be void. This decision alone is evidently not enough to indemnify the parties interested for the loss incurred in consequence of the capture, and this loss may have been considerable, since the vessel has been during a period, which may often be a very long one, prevented from engaging in her ordinary trade. May these parties claim to be compensated for this injury? Reason requires that the affirmative answer should be given, if the injury has been undeserved—that is to say, if the capture was not brought about by some fault of the parties. It may, indeed, happen that there was good reason for the capture, because the master of the vessel searched did not produce evidence which ought in the ordinary course to have been available and which was only furnished at a later stage. In such a case it would be unjust that compensation should be awarded. On the other hand, if the cruiser has really been at fault, if the vessel has been captured when there were not good reasons for doing so, it is just that compensation should be granted.

It may also happen that a vessel which has been captured and taken into a port is released by the action of the executive without the intervention of a prize court. The existing practice, under such circumstances, is not uniform. In some countries the prize court has no jurisdiction, unless there is a question of validating a capture, and can not adjudicate on a claim for compensation based upon the ground that the capture would have been held unjustifiable; in other countries the prize court would have jurisdiction to entertain a claim of this kind. On this point, therefore, there is a difference which is not altogether equitable, and it is desirable to lay down a rule which will produce the same result in all countries. It is reasonable that every capture effected without good reasons should give to the parties interested a right to compensation without its being necessary to draw any distinction between the cases in which the capture has or has not been followed by a decision of a prize court; and this argument is all the more forcible when the capture may have so little justification that the vessel is released by the action of the executive. A provision in general terms has therefore been adopted, which is capable of covering all cases of capture.

It should be observed that in the text no reference is made to the question whether the national tribunals are competent to adjudicate

on a claim for compensation. In cases where proceedings are taken against the property captured no doubt upon this point can be entertained. In the course of the proceedings taken to determine the validity of a capture the parties interested have the opportunity of making good their right to compensation, and if the national tribunal does not give them satisfaction they can apply to the international prize court. If, on the other hand, the action of the belligerent has been confined to the capture it is the law of the belligerent captor which decides whether there are tribunals competent to entertain a demand for compensation; and if so, what are those tribunals? The international court has not, according to the convention of The Hague, any jurisdiction in such a case. From an international point of view the diplomatic channel is the only one available for making good such a claim, whether the cause for complaint is founded on a decision actually delivered or on the absence of any tribunal having jurisdiction to entertain it.

The question was raised as to whether it was necessary to draw a distinction between the direct and the indirect losses suffered by vessel or goods. The best course appeared to be to leave the prize court free to estimate the amount of compensation due, which will vary according to the circumstances and can not be laid down in advance in rules going into minute details.

For the sake of simplicity mention has only been made of the vessel, but what has been said applies, of course, to cargo captured and afterwards released. Innocent goods on board a vessel which has been captured suffer, in the same way, all the inconvenience which attends the capture of the vessel; but if there was good cause for capturing the vessel, whether the capture has subsequently been held to be valid or not, the owners of the cargo have no right to compensation.

It is perhaps useful to indicate certain cases in which the capture of a vessel would be justified, whatever might be the ultimate decision of the prize court. Notably, there is the case where some or all of the ship's papers have been thrown overboard, suppressed, or intentionally destroyed on the initiative of the master or one of the crew or passengers. There is in such a case an element which will justify any suspicion and afford an excuse for capturing the vessel, subject to the master's ability to account for his action before the prize court. Even if the court should accept the explanation given and should not find any reason for condemnation, the parties interested can not hope to recover compensation.

An analogous case would be that in which there were found on board two sets of papers, or false or forged papers, if this irregularity were connected with circumstances calculated to contribute to the capture of the vessel.

It appeared sufficient that these cases in which there would be a reasonable excuse for the capture should be mentioned in the present report, and should not be made the object of express provisions, since otherwise the mention of these two particular cases might have led to the supposition that they were the only cases in which a capture could be justified.

Report of committee which drafted Declaration of London.

When a vessel is taken and brought into any of the ports of the contracting parties, if upon examination she be found to be loaded only with merchandizes declared to be free, the owner, or he who has made the prize, shall be bound to pay all costs and damages to the master of the vessel unjustly detained.

Treaty of Amity and Commerce concluded between the United States and Sweden, April 3, 1783, Article XIII.

The judgment [of the Prize Court] states;

\* \* \* \* \*

2. What damages shall be given, to whom, and by whom, in case: (a) of invalid or unlawful stopping or seizure by the officers of war vessels; (b) of delay in procedure or decision of the case; and (c) of liberation of the vessel and cargo.

Institute, 1887, p. 73.

#### Responsibility for loss of vessel.

If a prize is lost by the perils of the sea, the fact must be carefully ascertained. In that case no indemnity is due, either for the ship, or for the cargo, provided that if the prize be subsequently annulled the captor is able to prove that the loss would have occurred even without capture.

Institute, 1913, p. 199.

If the seizure of the ship or of the goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or the goods.

Institute, 1913, p. 199.

In the case of a captor's using the ship or the cargo after the seizure, he must, if his act is held to have been illegal, pay the interested parties an equitable indemnity, according to the documents drawn up at the time the vessel or goods were used.

Institute, 1913, p. 200.

If the neutral has acted with candor and good faith, and the inquiry has been wrongfully pursued, the belligerent cruiser is responsible to the neutral in costs and damages, to be assessed by the prize court which sustains the judicial examination. The mere exercise of the right of search involves the cruiser in no trespass, for it is strictly lawful; but if he proceeds to capture the vessels [vessel] as prize, and sends her in for adjudication, and there be no probable cause, he is responsible. It is not the search, but the subsequent capture, which is treated in such a case as a tortious act. If the capture be justifiable, the subsequent detention for adjudication is never punished with damages; and in all cases of marine torts, courts of admiralty exercise a large discretion in giving or withholding damages.

Kent, vol. 1, pp. 165, 166.

\* \* \* and damages are not awarded [by a prize court] because the vessel turns out, on such an investigation, to be exempt from condemnation, as they would be in case of private civil proceedings,

but only where the capture and sending-in were without probable cause appearing, upon such examination as could reasonably be required of a cruiser at sea, under the circumstances of the case.

Note 186, Dana's *Wheaton*.

*Probable cause* of seizure is, by the general usage of nations and the decisions in admiralty, a sufficient excuse in cases of capture *de jure belli*, and this question belongs exclusively to the court, which has jurisdiction to restore or condemn. \* \* \* If there be a reasonable suspicion, it is proper to make the capture, and submit the cause for adjudication before the proper tribunal, and, although the court should acquit without the formality of further proof, the captors will be justifiable, by reason of such probable cause; but where the seizure is wholly without excuse, they are liable for costs, and for the damages which ensue from the seizure, and such damages and costs will be decreed to the party injured. The liability of the captor for damages and costs, depends, in general, upon his good faith and intentions; a court will seldom impose damages for a mere error of judgment, unless the irregularity is very gross, and works a serious injury to the claimants. They are never responsible for the neglect or error of the captured vessel. Thus, if a vessel, although not liable to condemnation, has defective documents on board, or does not show proper papers, the captor is not liable for either costs or damages, but, on the contrary, the court will generally allow him costs and expenses, to be paid by the claimants to whom the restitution is made. But, if he unreasonably delay to procure an adjudication, or is otherwise guilty of negligence or good faith, he is liable for costs and damages.

Halleck, pp. 743, 744.

If, on trial by the prize court, the grounds on which the capture was effected turn out to be good, condemnation will ensue, and by the law of most countries the captors will receive the proceeds of the sale of the captured property in the form of prize money. If the evidence against the vessel is not conclusive, though there are circumstances of just and reasonable suspicion, she will be released, but her owners will have to bear the expense of detention and delay. But if the capture was effected on frivolous and foolish grounds, the parties interested have a right to compensation.

Lawrence, p. 471.

#### **When vessels are released without trial.**

Besides the case in which captured vessels must be abandoned, because they cannot for some reason or another be brought into a port, there are cases in which they are released without a trial. The rule is that a captured neutral vessel is to be tried by a Prize Court in case the captor asserts her to be suspicious or guilty. But it may happen that all suspicion is dispelled even before the trial, and then the vessel is to be released at once. For this reason article 246 of Holland's *Prize Law* lays down the rule: "If, after the detention of a vessel, there should come to the knowledge of the commander any further acts tending to show that the vessel has been improperly detained, he should immediately release her \* \* \*" Even after she has been brought into the port of a Prize Court, release can take



place without a trial. Thus the German vessels *Bundesrath* and *Herzog*, which were captured in 1900 during the South African War and taken to Durban, were, after search had dispelled all suspicion, released without trial.

Oppenheim, vol. 2, p. 551-552.

"In all prize cases where claims for indemnity were presented to the Department of State by foreign governments on behalf of their subjects for seizures made by our war vessels [during the war with Spain], the rule adopted was to reject claims for indemnity in cases where the prize court had found probable cause, and to refer to the Court of Claims all claims for indemnity in cases where probable cause may not be found."

Mr. Hay, Secretary of State, to Attorney-General, Jan. 5, 1900, Moore's Digest, Vol. VII, p. 598.

If a Commander in the exercise of these powers detain a Vessel without probable cause, or do an act not sanctioned by International law or otherwise unwarrantable, he will incur the displeasure of Her Majesty's Government, and will also be personally liable for damages.

The Commander is likewise responsible in damages for the acts of all under his command, whether he himself is present or absent; and this responsibility is not shifted upon his Superior Officer (as the Commander of the Squadron or of the Fleet), unless such Superior Officer be actually present and coöperating, or has issued express orders for the doing of the act in question.

Even although the Vessel and Cargo be condemned as Lawful Prize, the Captors may be deprived by the Prize Court of all interest in the same, if in relation to the Vessel or her Cargo, or any Person on board, they have committed any offence against the Law of Nations, or against the Naval Prize Act, 1864, or against any Act relating to Naval Discipline, or against any order in Council or Royal Proclamation, or any breach of Her Majesty's Instructions relating to Prize, or any act of Disobedience to the Orders of the Lords of the Admiralty, or to the Command of a Superior Officer.

Holland, p. 5.

#### **What constitute good reasons for capture.**

If, upon Visit and Search of the Vessel, the Commander has reason to entertain any suspicion, he should give the Master an opportunity of explanation; and if, after such opportunity given, he is satisfied that there is Proper Evidence against her amounting to probable cause for her Detention, he should detain her.

#### **What is proper evidence against a vessel amounting to probable cause for her detention.**

Proper Evidence is such evidence as will be admissible before the Prize Court: viz. (1) facts appearing by inspection, as the character of the Vessel, her Equipment, Cargo, and Crew; (2) the Papers on board of her; and (3) the testimony of her Master and Crew. The Commander should remember that no evidence by any of the Captors in their own behalf will, at all events in the first instance, be admitted before the Prize Court.

Evidence against the Vessel amounts to probable cause for her Detention when the circumstances connected with the Vessel and Cargo are such as to afford reasonable ground for belief that the Vessel or Cargo, or both, or part of the Cargo, might prove upon further inquiry to be Lawful Prize; and it is immaterial whether these circumstances arise from the misconduct of the Master or are beyond his control.

The Commander should bear in mind that, if the Court should find that the Vessel has been detained without probable cause, then, although there has been nothing intentionally vexatious in his conduct, he will be condemned in costs and damages, even to the extent of making good any losses that have been the result of inevitable accident to the Vessel and Cargo while in his hands.

On the other hand, if the Court comes to the conclusion that there was probable cause for the Detention, then, although the Vessel may be ordered to be restored, the Commander will be held to have been in lawful possession of her, and therefore not answerable for casualties.

#### **Detention upon second seizure.**

Sometimes it happens that the Vessel has been previously seized by another of Her Majesty's Cruisers, and allowed to proceed as not being Lawful Prize: in such case the Commander should use special precaution; but if he is nevertheless satisfied that there is probable cause for the Detention of the Vessel, he should detain her.

#### **Detention the act of the Commander alone.**

The Commander of the Cruiser is alone responsible for the Detention of a Vessel, unless the Commander of the Squadron is actually present and coöperating, or himself expressly orders the Detention. The authority therefore for the formal Detention of a Vessel should in all cases proceed from the Commander. But any Officer of inferior rank, who, whilst at a distance from his Commander, falls in with a Vessel, and after Visit and Search, has reason to believe that she is liable to Detention, should hold possession of her till he has communicated with his Commander.

Holland, pp. 67-69.

Apart from the restoration of property which ought to be returned, or the payment of the equivalent of its value (Articles 28 and 29), a special indemnity may be awarded to the original owner for losses caused by the seizure of the property, when it is recognised that the property was seized without sufficient reason, or that the seizure was an infringement of Agreements concluded (Article 16 and 17). If the property is returned in a damaged condition, an indemnity may be awarded to the owner for his losses, if it is proved that the damage was caused by the fault or neglect of officials whose duty it was to preserve the property.

Russian Regulations, 1895, Article 30.

The prize court will adjudge as to confiscation or release with or without damages; in case of the \* \* \* release of the prize by the captain himself, as to damages.

German Prize Rules, 1909, Article 1.

If the capture of ships and goods is not upheld by the prize court, or if they are released before prize court proceedings are instituted, the parties interested have claim for damages, unless there were sufficient grounds for seizure (see 13 (c) and 14 (c).)

The latter is always the case when any person found on board the ship has destroyed or concealed ships papers, or when two sets, false, or falsified ships papers are found on board, so far as the said irregularities have connection with circumstances of weight in deciding between the seizure or release of the ship.

German Prize Rules, 1909, Article 8.

If the foregoing right be exercised when, in the judgment of the prize court the special circumstances in question did not exist, the owners of the goods always have a claim for damages. The same holds when the seized goods are shown to be nonconfiscable.

German Prize Rules, 1909, Article 121.

Article 64, Declaration of London, is substantially identical with section 149, Austro-Hungarian Manual, 1913.

*The "Mentor," 1 C. Rob., 179.*—In this case a suit was brought against the Admiral of the station for damages on account of claimed wrongful destruction of a vessel by two ships of his squadron.

The suit was dismissed as it was held that the Admiral was not privy to the fact, and it was said: "The actual wrong-doer is the man to answer in judgment."

**Right of compensation extends to freight.**

*Der "Mohr," 4 C. Rob., 314.*—This was the case of a neutral vessel, which in being brought in by a British cruiser to have her cargo examined was lost by the negligence of the prize master. In a former suit a decree had been issued that the value of the ship be restored to the neutral but the cargo had been condemned for further proof. In this case the question was whether the claimant could recover for freight.

Held that since the captor took *cum onere*, where, as in this case, the neutral had not been guilty of any improper conduct, the captor must answer for the freight as much as for the ship.

See also *The Bremen Flugge*, 4 C. Rob., 90; *The Fortuna*, id., 278.

**What constitute good reasons for capturing.**

*Del Col v. Arnold*, 3 Dall., 333.—In this case it was held that if a vessel has a Spanish register, and sails under Spanish colors, and has on board accounts describing her as Spanish property, there is probable cause for seizing her as belonging to Spanish subjects.

*Maley v. Shattuck*, 3 Cranch, 458.—This was a case arising from the capture by a United States warship, of a Danish vessel, suspected of being an American vessel engaged in violating the nonintercourse act passed against France. The owners sued the captain of the warship for wrongful seizure and judgment was recovered, which was paid by the United States.

*Locke v. United States*, 7 Cranch, 339.—In this case Chief Justice Marshall said: "The term 'probable cause,' according to its usual acceptation, means less than evidence which would justify con-

demnation; and in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion."

*The "Thompson,"* 3 Wall., 155.—In this case, in which the District Court for New York restored the vessel, the Supreme Court affirmed a decree of the District Court denying damages or costs, on the ground that there was "probable cause" for the seizure, and stated that "probable cause" exists where there are circumstances sufficient to warrant suspicion, even though not sufficient to warrant condemnation.

See also *The Dashing Wave*, 5 Wall., 170; *The Amiable Nancy*, 3 Wheaton, 546; *Talbot v. Three Brigs*, 1 Dall., 95.

*The "Ostsee," Spinks Prize Cases*, 174.—In this case it was held that a neutral vessel captured for breach of a blockade when, in fact, no blockade existed is entitled to costs and damages against the captors.

The court said that condemnation in costs and damages is an extreme measure and should be adopted only when justice imperatively demands it; that to entitle claimants to such costs and damages it is not necessary to prove vexatious conduct on the part of the captor, nor will an honest mistake on the part of the captor relieve him from liability, not even if such mistake arises from the proceeding of his own Government, but in that event he should be indemnified by his Government.

**Restitution, unless judicially recorded, not bar to second seizure.**

*The "Odessa," Spinks Prize Cases*, 208.—In this case the vessel was seized upon her arrival in a British port, was immediately released and was seized again, after remaining in the port six months.

Held that the restitution not having been judicially recorded, the seizers were at liberty to make a second seizure, but at the peril of costs and damages.

See, to the same effect *The Haabet*, 2 C. Rob., 174.

*The "Leucade," Spinks Prize Cases*, p. 217.—In this case an Ionian vessel had been seized by an English captor on the ground of illegal trade with Russia. It was held, however, that the trade was legal and the vessel was released, and the owners made a claim for restitution and costs. The claim was upheld.

In the case of *The Science*, decided by the British and American Claims Commission of 1871, British claimants against the United States were awarded damages as compensation for a capture not upheld by the Courts. Many other claims based on similar grounds were denied by the Commission presumably on the ground that there were good reasons for the captures.

See Hale's Report of the Commission.

*The "Nostra Señora de Regla,"* 108 U. S., 92.—The court said: "The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the Court may, in case of restitution, decree demurrage against him as damages."

See also *Slocum v. Mayberry*, 2 Wheaton, 1; *The Apollon*, 9 Wheaton, 377; *The Lively*, 1 Gall., 315; *The Corier Maratino*, 1 C. Rob., 287.

*Hooper, Admr., v. U. S.*, 22 Ct. Cl., 408.—The court said: "The distinction must not be forgotten between a legal and justifiable seizure and an illegal and unjustifiable condemnation. The seizure of a vessel may be successfully defended upon grounds which would not support a subsequent condemnation and prize courts deny damages when there was probable cause for the seizure, and are often justified in awarding to the captors their costs and expenses; even when the vessel and cargo are decided not good prize and returned to their owners \* \* \* The burden of proof in prize proceeding is on the seized vessel. \* \* \* which means no more than that she must explain away suspicious circumstances."

See also *Jecker v. Montgomery*, 13 How., 498; *Murray v. The Charming Betsey*, 2 Cranch, 64.

#### Responsibility for loss of vessel.

In the ship *Tom*, 29 Ct. Cl. 68, it was held that a belligerent, seizing a neutral vessel upon mere suspicion, is responsible for the vessel, and is excused for her loss only when it is caused by unavoidable casualty.

In *The "Caroline Wilmans"*, 27 Ct. Cl., it was held that captors are not liable for loss, without their fault, of a vessel seized and held as contraband of war.

*The "Nancy"*, 37 Ct. Cl., 401.—In this case it was held that where the illegality of a seizure is shown, the owners are entitled to indemnity.

*The Paquete "Habana"*, 175 U. S. 677.—In this case the court decreed that the proceeds of the vessel and cargo should be restored to the claimants with compensatory and not punitive damages and costs.

See also *The Paquete Habana*, 189 U. S., 453, in which the court ordered that under the circumstances of the case, the decree should be entered against the United States and not against the captors individually.

#### What constitute "good reasons" for capture.

*The "Saxon Prince," Russian and Japanese Prize Cases*, vol. 2, p. 312.—In this case the vessel was carrying railway material to Muroran. The bill of lading was made out for Shanghai and the clearance certificate from the British Consulate at that port stated that the ship was in ballast. On being summoned by a Japanese war-ship, she failed to stop until fired upon.

Held that in view of the above circumstances the capture was lawful, although the vessel was released.

The functions of Ambassadors, Ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.—*Lieber, Section 9.*

On the other hand, if a diplomatic agent accredited to a country which is at war with another is found by the forces of the latter upon the territory of its enemy, he is conceded all the rights of inviolability which can come into existence as against a state having only military jurisdiction. Whether his privileges extend further, and if so how much further, must probably be regarded as unsettled. The point has not been considered by jurists, and until lately, whether by accident or through the courtesy of belligerents, it has not presented itself in the form of a practical question. During the siege of Paris however it was partially raised by the conduct of the German authorities with reference to the correspondence of diplomatic representatives shut up in the besieged city. On the minister of the United States being refused leave to send a messenger with a bag of despatches to London, except upon condition that the contents of the bag should be unsealed, Mr. Fish directed the American minister at Berlin to protest against the act of the German commanders, and argued in a note, in which the subject was examined, that the right of legation, that is to say the right of a state to send diplomatic agents to any country with which it wishes to keep up amicable relations, is amply recognised by international law, that a right of correspondence between the government and its agent is necessarily attendant upon the right of legation, that such correspondence is necessarily confidential in its nature, that the right of maintaining it would be nullified by a right of inspection on the part of a third power, and finally that there is no trace of any special usage authorising a belligerent to place diplomatic agents in a besieged town on the same footing as ordinary residents by severing their communication with their own governments.

Looking at the question from the point of view of strict legal right, it is not altogether clear that any good reason can be assigned for giving the interests of a state accrediting an agent priority over those of a belligerent. It is no doubt true that the right of legation is fully established. But the right of legation, primarily at least, is only a right as between the states sending and receiving envoys; in other words, it only secures to each of two states having relations with each other the opportunity of diplomatic intercourse with the other. Is there any sufficient reason for enlarging it to embrace a power of compelling third states to treat countries sending envoys as exercising a right which has priority over their own belligerent

rights? Even in time of peace it has been seen that an ambassador can only claim his complete diplomatic immunities in the state to which he is accredited. His privileges in their full extent are dependent on the fact that he has business to transact with the power by whom the privileges are accorded. Wholly apart therefore from any question as to the effect of a conflict between those privileges and urgent interests of a belligerent, there is no presumption in favour of the existence of an obligation on the part of the latter to grant more than personal inviolability. And if the existence of a conflict can be alleged, the case against the priority of ambassadorial rights over those of a belligerent becomes stronger. The rules of war dealing with matters in which such conflict occurs certainly do not presuppose that the rights of neutrals are to be preferred to those of belligerents; and the government of the United States itself, while in the very act of protesting against the right of communication between a state and its agents being subordinated to belligerent rights, admitted that 'evident military necessity' would justify a belligerent in overriding it. On the whole it seems difficult, in the absence of a special custom, to deny to belligerents the bare right of restricting the privileges of a minister, not accredited to them, within such limits as may be convenient to themselves, provided that his inviolability remains intact.

The question however assumes a different aspect if it is looked at from the point of view of the courtesy which a state may reasonably be expected to show to a friendly power. Diplomatic relations are a part of ordinary international life; there is no reason for supposing that their maintenance is inconsistent with amity towards the invading government; there is on the other hand every reason to suppose that their interruption may be productive of extreme inconvenience to its friend. To withhold any privileges which facilitate those relations, in the absence of suspicion of bad faith or of grave military reasons, is not merely to be commonly discourteous, it is to be ready to injure or imperil the serious interests of a friend without the existence of reasonable probability that any important interests of the belligerent will be remotely touched.

Hall, pp. 325-327.

DIPLOMATIC AGENTS OF NEUTRAL POWERS TO HOSTILE GOVERNMENT, SAFE CONDUCT TO,  
THROUGH BELLIGERENT TERRITORY.

Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the State, and not by subordinate officers.—*Lieber, Section 87.*

Extension of rule.

To attack or to hinder the transportation of the following diplomats or diplomatic messengers is forbidden: 1. neutrals; 2. those accredited to neutral governments; 3. those sailing under a neutral flag between neutral ports or between a neutral and a belligerent port.

*Institute, 1896, p. 130.*

He [Vattel] afterwards limits this right of passage to the ambassadors of sovereigns with whom the State through which the attempt to pass is, at the time, in the relations of peace and amity; and adduces, in support of this limitation of the right, the case of Marshal Belle-Isle, French ambassador at the Prussian court, in 1744, (France and Great Britain being then at war,) who, in attempting to pass through Hanover, was arrested and carried off a prisoner to England.

*Dana's Wheaton, p. 322; Vattel, Droit des Gens, Liv. iv, ch. 7, secs. 84, 85.*

To preclude the ambassadors of the neutral from egress and ingress into enemy's territory is unfriendly.

*Woolsey, p. 283.*

Neutral States may continue to maintain diplomatic intercourse with the belligerent Powers undisturbed, so far as military measures do not raise obstacles in the way of it.

*German War Book, p. 199.*



Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to Martial Law in cases of urgent necessity only: their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.—*Lieber, Section 8.*

Contra, to some extent.

Except as specified in Article 5 above [for acts performed in their official capacity and within the limits of their powers], consuls are amenable to the courts of the country in which they exercise their functions as regards both civil and criminal matters.

Nevertheless, every proceeding directed against a consul is suspended until his government, duly notified through the diplomatic channel, has been able to confer with the government of the receiving State on a fitting settlement of the incident.

This previous notice is not necessary:

1. In case of a flagrant offense or of a crime;
2. In suits *in rem*, including suits for possession, whether relating to personal property or to real estate situated in the country;
3. When the consul himself has begun the litigation or accepted suit in the local courts.

In no case may consuls be arrested or detained, except for grave infractions of the law.

Institute, 1896, p. 125.

Contra.

Consuls are excused from paying \* \* \* (3) war taxes.

Institute, 1896, p. 127.

Consuls are not public ministers. \* \* \* if guilty of illegal or improper conduct \* \* \* [they] may be punished by the laws of the State where they reside \* \* \*. In civil and criminal cases they are subject to the local law, in the same manner with other foreign residents owing a temporary allegiance to the State.

Dana's Wheaton, p. 324.

But a consul does not come within this exception, although mere residence in the performance of his official duties may not confer on him a foreign domicile, nevertheless, his consular character affords no protection to his mercantile adventures. "If," says Duer, "he reside in a belligerent country, his ships and goods are liable to confiscation as those of an enemy, by the hostile belligerent."

Halleck, pp. 708, 709; Duer on Insurance, vol. 1, pp. 513, 514.

They [consuls] have, during their term of office, according to the prevailing opinion, no special privileges beyond other foreigners, and are thus subject to the laws, both civil and criminal, of the country where they reside.

Woolsey, pp. 155, 156.

As a general rule he [a consul] is subjected to the laws of the country in which he lives to the same extent as persons who are of like status with himself in all points except that of holding the consular office. \* \* \* It is agreed however that the official position of a consul commands some ill-defined amount of respect and protection; that he can not be arrested for political reasons; that he has the specific privileges of exemption from any personal tax and from liability to have soldiers quartered in his house, \* \* \*

Hall, pp. 334, 335.

He [a merchant who is the consul for a neutral power] has [under the practice of England and the United States] the mercantile character of the country in which he is commercially domiciled, and he receives no protection or harm in his private affairs from his official position. If his property is liable to condemnation upon his mercantile character it is condemned; \* \* \* The French practice is so far different that the property of a neutral subject, consul for a neutral state in a belligerent country, and carrying on trade in the latter, is held to be itself neutral.

Hall, p. 521.

Consuls are not clothed with the diplomatic character, nor do they possess diplomatic immunities, except in the special cases that will be considered immediately. They are appointed by the sovereign of the country whose agents they are, and they receive from the foreign office of the state where they reside a document called an *exequatur*, which authorizes them to act as consuls in that state, and to hold official communication with the functionaries of its internal administration. They are under the local law and jurisdiction, and their private residences are not held to be exempt from the authority of the local functionaries.

Lawrence, pp. 321, 322.

It was held by the Attorney General of the United States in 1899 that the condemnation by the United States of tobacco belonging to the Portuguese vice consul at Gibara, Cuba, and seized aboard a Spanish vessel was valid, notwithstanding the consular character of its owner.

22 Op. Atty. Gen., 327.

The Commercial Domicil of a Consul who trades is in the place of his Trade, not in the country which he represents.

Holland, p. 11.

*The "Indian Chief," 3 C. Rob., 12.*—In this case the cargo of the vessel, belonging to the American consul at Calcutta, was condemned, as he was held to have a commercial domicil in British territory.

*The "Aina," Spinks Prize Cases, 8.*—In this case, the court said: "Two questions have arisen with respect to the present claim: first,

as to the national character of the claimant, whether he is to be considered an enemy or a neutral; \* \* \*

"Now, with reference to the first question, it is stated that 'he is a citizen of the Free Hanse Town of Lubeck, and Consul of his Majesty the King of the Netherlands at Helsingfors in Finland.' Upon this I can put but one construction, that he is resident in Finland, and carrying on his business there. I take it to be a point beyond controversy, that where a neutral, after the commencement of war, continues to reside in the enemy's country for the purposes of trade, he is considered as adhering to the enemy, and as disqualified for claiming as a neutral altogether."

*The "Johanna Emilie," Spinks Prize Cases, 12.*—The court said: "Now Mr. Rucker is a gentleman who, according to the evidence, is an Hanoverian subject, acting as the Hanoverian Consul, resident at Riga, a Russian port. He has been domiciled there for many years, and must therefore, in consequence of his domicile, in all that relates to his national character be taken to be a Russian, not an Hanoverian."

### **Treaties between Belligerent States and a Third State.**

The provisions of Articles 1 to 6 shall apply, in the relations between belligerent States, to treaties concluded between them and a third State, with the following reservations.

When the obligations which bind belligerent States in their relations with each other have the same object as their contracts with a third State, they shall be carried out in the interest of the latter. Thus collective treaties of guarantee shall remain in force in spite of war between two of the contracting States.

Collective agreements shall remain in force in the relations of each of the belligerent States with the third contracting State.

They may not be altered by a treaty of peace to the detriment of the third contracting State, without the participation or the consent of the latter.

**Treaties concluded between a belligerent State and a third State, are not affected by the war.**

In default of a formal clause to the contrary or of a provision leaving no doubt as to the intention of the parties, collective treaties relating to the law of war apply only if the belligerents are all contracting parties.

[The provisions of Articles 1 to 6, above mentioned, are as follows:]

ART. 1. The opening and the carrying on of hostilities shall have no effect upon the existence of treaties, conventions and agreements, whatever be their title and subject, concluded between themselves by belligerent States. The same is true of the special obligations arising from the said treaties, conventions and agreements.

ART. 2. War, however, automatically terminates:

1. Agreements of international associations, treaties of protection, control, alliance, guarantee; treaties concerning subsidies, treaties establishing a right of security or a sphere of influence, and, generally, treaties of a political nature;

2. All treaties, the application or the interpretation of which shall have been the direct cause of the war, in consequence of the official acts of either of the governments before the opening of hostilities.

ART. 3. In applying the rule set forth in Article 2, account must be taken of the contents of the treaty. If, in the same act, occur clauses of different kinds, only those shall be considered annulled which come under the categories enumerated in Article 2. When, however, the treaty is of the character of an indivisible act, it terminates as a whole.

ART. 4. The treaties which remain in force and the carrying out of which is still, in spite of hostilities, practically possible, shall be observed as in the past. Belligerent States may not disregard them except to the degree and for the time required by the necessities of war.

ART. 5. Treaties which have been concluded for the contingency of war are not covered by Articles 2, 3, and 4.

ART. 6. Aside from the responsibility that would be incurred by the violation of these rules, they should serve to interpret the silence of and to supply the omissions in a treaty of peace. In default of a formal clause to the contrary in a peace treaty, it shall be decided:

1. That treaties affected by the war are definitively annulled;
2. That treaties not affected by the war, whether suspended or not during the progress of hostilities, are tacitly confirmed;
3. That treaties the clauses of which conflict with the contents of the peace treaty are nevertheless implicitly abrogated;
4. That the abrogation of a treaty, express or tacit, has no retro-active effect.

Institute, 1912, pp. 172-174.

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NAVIGATION BY NEUTRALS UPON INTERNATIONAL RIVERS.

**In time of war, navigating upon international rivers is free for the flags of neutral nations, except as to the observation of restrictions imposed by the force of circumstances.—**

*Institute, 1887, p. 79.*

If it should happen (which God forbid) that war should break out between any of the States, Republics or Provinces of the river Plate or its confluent, the navigation of the rivers Paraná and Uruguay shall remain free to the merchant flag of all nations, excepting in what may relate to munitions of war, such as arms of all kinds, gunpowder, lead and cannon balls.

Treaty between the United States and the Argentine Republic, concluded July 10, 1853, Article VI.

















